80-1085

No. _____

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., *et al.*,

Petitioners,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the District Court must deny a preliminary injunction, regardless of the gravity of irreparable harm or the weight of other equitable considerations, unless it finds that plaintiffs are likely to succeed on the merits?

2. Did the Court of Appeals err in reversing a preliminary injunction, which enjoined pending trial the allegedly unconstitutional government taking and disclosure of petitioners' trade secret research data, by applying a test for interim injunctive relief so difficult of fulfillment that it deprives petitioners of rights under the just compensation and due process clauses of the fifth amendment?

PARTIES TO THE PROCEEDING

Petitioners submit, pursuant to amended Rule 28.1 and Rule 21.1(b), the following list of all petitioners and their United States parents, subsidiaries (except wholly owned subsidiaries), and affiliates. Some petitioners listed have numerous foreign affiliates, parents, and subsidiaries which have not been listed. Petitioners will prepare and submit an exhaustive listing of all such foreign affiliates, parents, and subsidiaries if the Court so desires.

Abbott Laboratories
Ciba-Geigy Corporation
Toms River Chemical Corporation
Alza Corporation
E.I. du pont de Nemours & Company

FMC Corporation
- Avicon, Inc.
- Cogas Development Company
- Collagen-Research Associates

Rhone-Poulenc, Inc.

Rohm and Haas Company
- Canus Petroleum Inc.
- Romicon Inc.
- Comex Inc.

Salsbury Laboratories, Inc.
- Soltex Polymer Corporation (Parent)
- Soltex Laboratories, Inc. (Parent)
  - Sea-Born Inc.

Sandoz, Inc.
- Sandoz United States, Inc. (Parent)
  - Chicago Dietetic Supply, Inc.
  - Delmark Co., Inc.
  - Northrup-King Co.
  - Ovaltine Products, Inc.
  - Rogers Bros. Seed Company

Stauffer Chemical Company
- Basic Management Inc.
- Montrose Chemical Corporation of California
- Montrose International Sales Corporation
- Mt. Pleasant Chemical Company
- North Idaho Phosphate Company
- Pacific Chemical Industries, Pty., Ltd.
- Stauffer Chemical Company of Wyoming
- SWS Silicones Corporation
- Texas Alkyls, Inc.

Union Carbide Agricultural Products Company, Inc.
- Union Carbide Corporation (Parent)
  - Grower Service Corporation (New York)
  - Soilserv, Inc.
  - Keystone Seed Company

Uniroyal, Inc.
    Computeristics, Inc.
    Monochem, Inc.
    Rubicon Chemicals, Inc.
    Intermarket Latex, Inc.
The Upjohn Company
Velsicol Chemical Corporation
    Northwest Chemco, Inc. (Parent)
    Northwest Industries, Inc. (Parent)

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DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 24, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 481 F. Supp. 195 (1979) and is reproduced in Appendix B. The opinion of the Court of Appeals for the Second Circuit, dated September 24, 1980, is set out in Appendix A.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 24,

1980. Plaintiffs-appellees' petition for rehearing was denied by order dated November 5, 1980; this order is set forth in Appendix D. Plaintiffs-appellees petition for a stay of the mandate pending application for certiorari was granted by order dated December 2, 1980, Appendix E. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. §1254(1)(1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The texts of the relevant constitutional, statutory and regulatory provisions are set forth in Appendix F. The provisions are cited below.

1. United States Constitution, Amendment V
2. Federal Pesticide Act of 1978, 92 Stat. 819, amending the Federal Insecticide, Fungicide, and Rodenticide Act, §§3(c)(1)(D) and 10, 7 U.S.C. §§136a(c)(1)(D), and 136h (Supp. III 1979)
3. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 979, §§3(c)(1)(D) and 10, as amended on October 21, 1972
4. The Trade Secrets Act, 18 U.S.C. §1905 (1976)
5. Regulations of United States Department of Agriculture: 7 C.F.R. §1.3(b)(1) (1949 ed.); 7 C.F.R. §1.2(a) (1954 ed.); 7 C.F.R. §1.4(a) (1962 ed.); 7 C.F.R. §1.4(b)(15) (1962 ed.); 7 C.F.R. §370.13(d) (1968 ed.)
6. Regulations of United States Food and Drug Administration, Department of Health, Education and Welfare: 32 Fed. Reg. 9318-19 (1967)

BASIS FOR FEDERAL JURISDICTION

The federal courts have jurisdiction over the subject matter of this action under 28 U.S.C. §1331(a) (1976), 28 U.S.C. §1337 (1976), and 28 U.S.C. §2201 (1976).

STATEMENT OF THE CASE

Petitioners request the Court to review the judgment of the Court of Appeals, reversing a preliminary injunction issued by the District Court, which had enjoined the Environmental Protection Agency ("EPA") pending trial from publicly disclosing the petitioners' trade secret pesticide chemical research data, and from using those data to support pesticide registrations of petitioners' competitors.

Petitioners are producers of pesticide chemicals. Effective September 30, 1978, amendments to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[1] for the first time authorized the EPA to publicly disclose trade secret research data previously submitted by the petitioners in confidence to the government, and also to use these data to support the issuance of pesticide registrations to petitioners' competitors. Petitioners challenged the constitutionality of these FIFRA amendments in the District Court and sought preliminary and permanent injunctive relief. Petitioners contended that these changes to the pesticide law were retroactive and effected a taking of their trade secret property without just compensation and due process of law in violation of the fifth amendment to the Constitution. The District Court granted a preliminary injunc-

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[1] Federal Pesticide Act of 1978, 92 Stat. 819, amending FIFRA §3(c)(1)(D) and §10, 7 U.S.C. §§136a(c)(1)(D), 136b(c)(1)(D) and 136h (Supp. III 1979). See Appendix F at 25a, 26a, and 28a.

tion. *Amchem Products, Inc.* v. *Costle,* 481 F.Supp. 195, 199 (S.D.N.Y. 1979), Appendix B, (preliminary injunction entered Aug. 15, 1979, Appendix C).

The record compiled by petitioners, consisting of extensive affidavits and exhibits, demonstrated that over a period of many years petitioners had invested huge sums in research to discover and test pesticide chemicals. The purpose of this research was to discover pesticidal uses of chemicals that were effective against a target pest but safe to humans and to the environment. When a chemical was found which met these stringent criteria, the research data which defined the chemical's safety and efficacy characteristics became of enormous competitive value worldwide.[2] Petitioners regarded the valuable portions of these research data to be trade secret properties and maintained them in confidence. Petitioners undertook the substantial risk, time, effort and expense required to perform the research with the expectation that the fruits of their labors, *i.e.*, the scientific data, would be the exclusive properties of the owners, and that the owners alone would be entitled to the competitive benefits from their use.

Beginning with the enactment of FIFRA in 1947, in order to market a pesticide a producer was required to register the product with the United States Department of Agriculture ("USDA").[3] As a condition for registra-

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[2] Fewer than one out of one million chemicals tested proves to have the safety and efficacy characteristics to be a successful pesticide. The research to develop and test a single pesticide may take ten years and cost more than twelve million dollars.

[3] Beginning in 1955, research data also were submitted to the Food and Drug Administration ("FDA") if a registrant sought to use the pesticide on food crops, pursuant to §408 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §346a (1976). The functions of both USDA and FDA were transferred to EPA in 1970. Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

tion, the agencies administering FIFRA have required applicants to submit their research data to the government to prove the safety and efficacy of the product.

As enacted in 1947, FIFRA itself neither authorized nor prohibited the government from disclosing trade secret research data or from using the data to support competing registrations. The Trade Secrets Act, 18 U.S.C. §1905 (1976), however, did and does expressly prohibit the disclosure of trade secret information submitted to the government. Agency regulations confirmed that trade secret information, specifically including research data, submitted by private persons would not be disclosed.[4] In fact, trade secret pesticide research data were not disclosed by any governmental authorities without the owner's authorization. Petitioners submitted their data to the government only for use in registering their own products, and with the expectation that the trade secret information would not be disclosed to com-

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[4] *See, e.g.*, 7 C.F.R. §1.2(a) (1954 ed.) and 7 C.F.R. §1.4(a) (1962 ed.)(providing USDA will keep secret information which any statute requires to be held confidential); 7 C.F.R. §1.3(b)(1) (1949 ed.) (providing that reports and supporting data submitted by applicants are adminstratively confidential); 7 C.F.R. §1.4(b)(15)(1972 ed.)(providing that "data concerning products and formulations provided by industry for research purposes or in connection with the Department's registration and other regulatory functions" are administratively confidential); 7 C.F.R. §370.13(d)(1968 ed.) (providing that "scientific and technical data on products" and "data in research studies" where disclosure would adversely effect the respondent are trade secrets and confidental); 32 Fed. Reg. 9318-19 (1967) (amending 10 C.F.R. §5.74 and Appendix A(11) to provide that "data in support of petitions relating to pesticide chemicals" are trade secrets and confidential). See Appendix F at 35a-38a.

petitors by the government and would not be used by the government to support competing registrations.[5]

In 1972 FIFRA was amended to expressly codify in that statute a prohibition against governmental disclosure of trade secret data and use of that data to support a competitor's registration.[6] After this amendment, the petitioners continued to perform research and submit the results to EPA in reliance on the government's recognition of their trade secret property rights.

In 1978, however, a fundamental change in the law was enacted. In response to a request by EPA, FIFRA was amended to retroactively strip away the former trade secret status of these previously submitted pesticide research data[7] — data worth many millions of dollars, generated and submitted to the government in reliance on then-existing legal protections for trade secrets. Under this amendment, EPA would use these test data as a basis for granting registrations of the same pesticides to competitors of petitioners, and would disclose to the public the research data which petitioners had submitted in confidence. The EPA has stated its intention to take these actions as soon as it is freed of injunctive restraint from doing so. The trade secret data could be used by

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[5] USDA never published any regulation or policy authorizing the use of a company's research data to support a competitor's registration. Nevertheless, such use of data apparently had occurred in some instances without prior or subsequent notification to the owner. This "secret" USDA use to the extent it occurred was not authorized by any of the petitioners, and was not authorized by any statute or regulation.

[6] FIFRA §§10(b) and 3(c)(1)(D), as amended by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. Appendix F at 33a-34a.

[7] Appendix F at 25a, 26a and 28a.

other companies for competitive product development, for worldwide competition, and to obtain competitive U.S. pesticide registrations.

Based on this record, petitioners contended before the District Court that the 1978 FIFRA amendments effected a taking of their trade secret properties. The amendments destroyed the secrecy, and therefore the competitive value, of the data, and compelled petitioners to relinquish their exclusive ownership and to share their trade secrets with the world at large.

Petitioners contended that the taking imposed by the 1978 amendments was unlawful retroactive action, upsetting legitimate investment-backed expectations in such an arbitrary manner that it violated petitioners' right to due process of law and was therefore beyond the authority of Congress. For this reason, petitioners alleged that they were entitled to a permanent injunction to restrain this unconstitutional action.

Petitioners argued further that the taking of their trade secret property violated the fifth amendment because Congress had withdrawn any opportunity to obtain just compensation. By statutorily restricting petitioners' remedy to a non-appealable arbitration proceeding against private users, the 1978 amendment to §3(c)(1)(D) implicitly but clearly withdrew any remedy for compensation under the Tucker Act, 28 U.S.C. §1491 (1976), and made it impossible for petitioners ever to recover just compensation for this governmental taking. (See Appendix F at 26a-27a).[8] For this independent

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[8] The 1978 amendment provides for arbitration only against a private data user, not against the government. Congress considered and rejected providing any arbitration remedy at all for research data submitted prior to January 1, 1970. Senate Comm. on

reason petitioners claimed entitlement to injunctive relief against enforcement of the 1978 amendment.

The District Court applied a traditional formulation of the test for the issuance of a preliminary injunction. It stated:

> [W]hat is absolutely clear at this point is that under the tests of *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247 (2d Cir. 1973), in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs who are here seeking continuing protection.

The court continued:

> The government does not dispute that if the injunction is not granted, many millions of dollars of trade research data submitted to the government over the past thirty years will in effect be destroyed in value to the submitters through disclosure to and use by their competitors. Obviously, once disclosed, trade secrets are lost forever.

Amchem Products, Inc. v. *Costle, supra,* 481 F. Supp. at 199, Appendix B at 16a. With respect to the impact of the injunction on the interested public, petitioners represented to the District Court that, despite the injunction against disclosure by EPA, they would themselves grant access to their pesticide data to public interest

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Agriculture, Nutrition & Forestry, Federal Pesticide Act of 1978, 95th Cong., 2d Sess. 64 (Comm. Print Jan. 1979). The arbitration is to be conducted by a labor mediator of the Federal Mediation and Conciliation Service. There are no standards to govern the arbitrator's award, which is "binding", and "no official or court of the United States shall have power or jurisdiction to review any such findings and determination" except for fraud or the like. Appendix F at 26a-27a.

scientists and representatives. Moreover, the injunction was drafted by agreement with EPA to permit interim use of petitioners' data by EPA for the "small business" pesticide registrants ("formulators") who do not manufacture the basic pesticide chemicals and who constitute almost 99% of all registrants. The injunction barred use of the petitioners' trade secret data only for the relatively few large competing basic producers.

On appeal, the Court of Appeals reversed the preliminary injunction on a single ground. The court held that to obtain a preliminary injunction against the enforcement of a statute, it was essential for the petitioners to show "a likelihood of success on the merits," regardless of the showing of irreparable harm or other equitable considerations. The court declared that the case presented "knotty questions that are difficult to answer on the present record. . . ." Appendix A at 7a. The court found uncertainty as to the factual issue of which data were trade secret,[9] and it found dispute on the legal issues concerning whether there had been an unconstitutional taking. The court observed that "the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment," and restated this Court's observation in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." Appendix A at 7a-8a. The court's opinion did not evaluate the merits of any of the ultimate legal issues, but only pointed out the existence of uncertainty and dispute. It concluded that

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[9] Petitioners' affidavits demonstrated that many portions of the research data were in fact trade secrets. EPA did not submit any affidavits or testimony opposing these assertions.

tioners had "failed to show a probability that the above questions will be answered in their favor and that they are likely to succeed on the merits." Appendix A at 9a.

The Court of Appeals appears to have assumed, as the District Court found, that petitioners would suffer irreparable harm if an injunction were not granted. It did not consider whether interim relief was necessary to preserve the trade secret subject matter of the case and to prevent the petitioners' constitutional rights from becoming moot by destruction of the subject matter before there could be an opportunity for trial. The Court of Appeals did not consider whether there would be an absence of any concrete injury to the public interest if an injunction were granted. The court did not attempt to review the District Court's balancing of the equities to determine whether the issuance of an injunction was warranted even if something less than a "likelihood of success" had been shown. The court based its ruling on the sole ground that the demonstration of a likelihood of success was essential, and could not be found on the record before it.

The petitioners filed a petition for rehearing, which was denied on November 5, 1980. The court, however, granted petitioners' request to stay the issuance of the mandate pending the filing of this petition for certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The issue upon this petition is the proper standard for grant of preliminary injunctive relief. The Court of Appeals has applied a standard which makes a showing of likelihood of success on the merits an indispensable condition for grant of a preliminary injunction, regardless of the gravity of irreparable harm or the weight of other equitable considerations.

The Second Circuit's standard is erroneous, and, as applied in cases like the present, unconstitutional.

It too narrowly places determinative significance upon the single factor of the movant's chances of success on the merits. Decisions of this Court and other federal courts of appeals call for that factor to be weighed together with the irreparability of harm and with other considerations.

Further, the Second Circuit's test is too severe in cases like the present, which involve complex legal issues. It may be virtually impossible for the movant to show, on a preliminary record, the "likelihood" or "probability" of success on the merits of such complex issues. This will especially be the case where, as here, the governing law is uncertain. The movant is substantially precluded from interim relief, no matter how great the harm he will suffer without it.

In the present case, the uncertainty and complexity of the constitutional law governing uncompensated and retroactive takings led the Court of Appeals to hold that petitioners had not shown that they were likely to succeed on the merits of their claims. If the existing preliminary injunction is dissolved, petitioners would incur harm that is truly irremediable: the public disclosure of their trade secret research data. By destroying the secrecy and exclusivity of use that are the essence of the trade secret property rights, the government would destroy before trial the subject matter as to which petitioners advance their claims of unconstitutional taking. Thus the Second Circuit test contravenes the just compensation and due process clauses of the fifth amendment, by denying claimants in the position of petitioners a reasonable opportunity to get the interim injunctive relief needed to preserve their remedies under those constitutional provisions.

I. The Question of the Proper Standard for Grant of Preliminary Injunctive Relief Is an Important One Which Should Be Resolved by This Court.

A. The Second Circuit's ruling, that a preliminary injunction must be denied unless the applicant demonstrates a likelihood of success on the merits, conflicts with decisions of this Court.

The Second Circuit's uncompromising insistence upon a showing of "likelihood of success" conflicts with the standard for grant of a preliminary injunction established by this Court.[10]

In *Ohio Oil Co.* v. *Conway,* 279 U.S. 813 (1929), this Court was presented with circumstances that are strikingly similar to the case at bar. The plaintiff there sought a preliminary injunction to prevent enforcement of a Louisiana state tax statute, contending that the statute as applied to plaintiff contravened the fourteenth amendment. Because of the "real dispute over material

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[10] The term "likelihood of success" (or "probability of success"), used to test preliminary injunctions, can be ambiguous. It may be used in a way which is neutral in a quantitative sense. Thus, if it is said that the court must make a finding as to the plaintiff's likelihood of success on the merits, this may be understood simply to require the court to gauge the plaintiff's chances, whatever they may be. The phrase would be equivalent to the expression "possibilities of success on the merits" used by this Court in *Brown* v. *Chote*, 411 U.S. 452, 456 (1973), discussed below.

It is clear from its opinion, however, that the Second Circuit in the present case used the term in a different sense. It requires denial of the injunction unless plaintiffs show that their chances of success meet an *implied quantitative standard* — certainly over 50 percent, and perhaps, from the tone of the opinion, substantially more.

questions of fact which cannot be satisfactorily resolved upon the present affidavits," 279 U.S. at 814-15, plaintiff could not demonstrate a probability of success on the merits. Nevertheless, the Court recognized that preliminary relief was necessary to preserve plaintiff's remedies pending an adjudication of his claim on the merits: absent a preliminary injunction plaintiff would be without a remedy if the statute were ultimately adjudged unconstitutional, because of the lack of a state procedure to obtain restitution of money paid. The Court held that the preliminary injunction should have been granted, despite plaintiff's inability to show a likelihood of success on the merits:

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. 279 U.S. at 815.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 822 n.15 (1973), this Court noted that where the possibility of irreparable damage to the moving party is great enough, a preliminary injunction may be justified even though the issuing court expressly refrains from making any assessment of the likelihood of success on the merits.

In *Brown* v. *Chote,* 411 U.S. 452 (1973), the Court held that the proper standard for issuance of a preliminary injunction requires a balancing of a movant's "possibilities" of success on the merits and the possibility of irreparable harm absent interlocutory relief. *Brown* involved a constitutional challenge to a

California statute requiring candidates in primary elections to pay a filing fee. Plaintiff, allegedly an indigent, sought a preliminary injunction against enforcement of the statute to allow him to participate in the primary, the deadline for which was one week away. The district court granted the injunction, concluding that "plaintiff may prevail on the merits and that, absent a preliminary injunction, his constitutional right may be irreparably lost." *Chote* v. *Brown,* 342 F. Supp. 1353, 1355-56 (N.D. Cal. 1972). This Court held that the district court "properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief. . . . *[I]ssuance of the injunction reflected the balance which that court reached in weighing these factors.* . . ." 411 U.S. at 456. (Emphasis added).

The Court in *Brown* v. *Chote* did not require a showing of "likelihood of success," which suggests that the plaintiff must demonstrate better-then-even chances of prevailing on the merits. Rather, this Court's phrase "possibilities of success" in itself establishes no quantitative standard which plaintiffs must meet, but merely identifies a factor to be balanced with the possibility of irreparable injury. To require "likelihood of success," irrespective of the irreparable injury and other equitable considerations, flies in the face of the approach established by this Court.

B. The ruling of the Court of Appeals conflicts with decisions of other courts of appeals.

The Second Circuit's ruling here creates a serious conflict among the circuits, which should be resolved by

this Court. Other circuits have held that it is error to require, without regard to countervailing considerations, a moving party to demonstrate a likelihood of success on the merits as a prerequisite to interlocutory relief.

Finding that the district court had erroneously required a showing of "likelihood of success," the Fourth Circuit in *Blackwelder Furniture Co.* v. *Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), held that a more appropriate standard is the "balance-of-hardship" test, which was "doubtless derived from *Ohio Oil Co.* v. *Conway*. . . ." 550 F.2d at 194. The test requires consideration of four distinct factors. Although likelihood of success is one of those factors, it is not indispensable, where the facts establish the possibility of irreparable harm:

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, *it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success.* Always, of course, the public interest should be considered. *Id.* at 196. (Emphasis added).

Likewise, in *Aguirre* v. *Chula Vista Sanitary Service and Sani-Tainer, Inc.*, 542 F.2d 779 (9th Cir. 1976), the Ninth Circuit held that it was error for the district court to "confine . . . its inquiry to whether appellants had established a probability of success on the merits." 542 F.2d at 781. The district court was directed to "balance the relative hardship to the parties that would result from granting or denying a preliminary injunction." *Id.*

In *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), the Ninth Circuit reversed and remanded a district court's

denial of a preliminary injunction, where the district court relied only on plaintiff's failure to establish probability of success. 526 F.2d at 88. The court directed the district court to employ an alternative test requiring plaintiff to demonstrate merely "that serious questions are raised and the balance of hardship tips sharply in his favor." *Id.*

The Ninth Circuit in *Roth* v. *Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. dismissed* 442 U.S. 925 (1979), approved the application of a test requiring that plaintiff raise "substantial questions" which are "fair ground for litigation," in lieu of the likelihood of success test, where the factual issues involved were very complex and the law was "far from certain." 583 F.2d at 537. The court added:

> In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction. . . .

Id. at 538, quoting *Metropolitan Detroit Plumbing & Mechanical Contractors Association* v. *HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976).

In contrast to the Second Circuit's approach here, other circuits have not required a finding that ultimate success by the moving party be a "mathematical probability," but rather have held that the "necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The District of Columbia Circuit there summarized the adoption by federal courts of the flexible balancing test:

> Our holding is generally in accord with the movement in other courts away from a standard incor-

> porating a wooden "probability" requirement and toward an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.

559 F.2d at 844. *See also Texas* v. *Seatrain International, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975), where the court noted that "none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus."

The Second Circuit's decision below implies that the normal balancing test must be suspended where a statute is sought to be enjoined. That conclusion is patently in conflict with *Ohio Oil*, which also involved an injunctive challenge to a statute. Moreover, the balancing test is not altered in other circuits where a statute is at issue. For example, in *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980), the Fourth Circuit held that the decision whether to issue a temporary injunction against enforcement of a state statute "must be based upon a flexible interplay of the four factors to be considered." Where the harm to the plaintiff greatly outweighs the harm to the defendant, "plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient." 618 F.2d at 1033.

Likewise, in *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978), plaintiff sought to enjoin enforcement of a federal statute requiring set-asides in public works projects for minority business enterprises. The court held that determination of whether a preliminary injunction should issue requires a "delicate balancing" of the four factors, and furthermore, that "where factors of irreparable

harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate 'even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required.' " 573 F.2d at 815, quoting *Delaware River Port Authority* v. *Transamerican Trailer Transport Inc.*, 501 F.2d 917, 923 (3d Cir. 1974).

C. It is not sound judicial administration or equity practice to require a demonstration of likelihood of success on the merits as an indispensable condition for the grant of a preliminary injunction.

Determination of the proper standard to govern the issuance of preliminary injunctions is a serious and far-reaching matter which has daily impact in the federal courts. This important question should be resolved by this Court.

The House of Lords of the United Kingdom has recently confronted the very question at issue here. Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396, strongly criticized the emphasis which some British courts had placed on assessment of the plaintiff's probability of success in determining whether a preliminary injunction should be granted. Rather than requiring the moving party to establish a probability of success, Lord Diplock stated that the court need only "be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." *Id.* at 407. Adopting Lord Diplock's approach, the House of Lords reinstated a preliminary injunction that had been granted by a trial court but reversed by the Court of Appeal on the basis of the moving party's failure to establish a "prima facie" case on the merits.

The Second Circuit's ruling here would impair the flexibility of the district courts in fashioning decrees, which is the hallmark of federal equity jurisdiction. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944). Courts of equity have for centuries exercised broad power in balancing the equities to determine whether a preliminary injunction should issue. Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 534 (1978). Even early formulations of the appropriate test indicate that a showing of likelihood of success on the merits is not a sine qua non for the grant of preliminary relief, if other factors are present:

> A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such questions can be disposed of.

Id. at 536, quoting W. Kerr, *A Treatise on the Law and Practices of Injunctions in Equity,* 11-12 (1867).

Fundamental fairness and sound judicial administration also should lead this Court to enunciate a test governing the issuance of preliminary injunctions that allows the federal district courts to balance equitable considerations. Probability of success alone should not be, as the Second Circuit erroneously held below, the controlling factor. Rather, the probability or possibilities of success should be considered as only one of the major elements to be assessed by the issuing court.

The stringent and unyielding test applied by the Second Circuit in this case pays no heed to the district court's needs in the common situation where it must

grant or deny a preliminary injunction on the basis of a sparse preliminary record. Although some showing must of course be made, application of an inflexible likelihood of success standard may prejudice a moving party who is under severe time constraints in moving to block the allegedly harmful event. *See, e.g., Brown* v. *Chote,* 411 U.S. 452 (1973), discussed above.

More important here, the rigid test employed by the Second Circuit ignores the inherent legal and factual difficulty of complex claims like those here presented, which the court itself said "raise knotty questions that are difficult to answer on the present record." Appendix A at 7a. Constitutional questions of this nature assuredly are difficult to resolve on a preliminary record, and a district court should not be forced to make a potentially dispositive prejudgment of the merits on such a record. The Second Circuit's test works to the clear disadvantage of all complex claims, including many constitutional claims, which are rarely mechanistically answered or easily predictable. Under the test prescribed by the Second Circuit here, a movant with an uncomplicated claim at issue could be entitled to preliminary relief, while a party with equally meritorious but more complex claims could not meet the required strict showing of likelihood of success and thus could not obtain preliminary relief.

Most egregiously, the uncompromising standard employed by the Second Circuit fails to make any accommodation for the situation in which, absent preliminary relief, plaintiffs may face vast and irreparable loss, as in this case. The District Court below found that, absent preliminary relief, petitioners would be irreparably harmed, Appendix B at 16a, and the Second Circuit did not dispute that conclusion. See Appen-

dix A at 6a. District courts should not be required to turn blindly away from equities such as these to follow a mechanical and unrealistic standard governing preliminary injunctions, nor should they forfeit their traditionally broad discretion in fashioning equitable decrees appropriate to the circumstances confronting them.

A standard for the issuance of preliminary injunctions which requires the district court to balance the relevant considerations has the further advantage of assuring that due weight is given to public interest concerns. Experience in other circuits demonstrates that threats to the public interest will be weighed along with the other factors by the issuing court. *See, e.g., Quaker Action Group* v. *Hickel,* 421 F.2d 1111, 1117 (D.C. Cir. 1969). The public interest considered must also include the importance of preserving the status quo in order to provide an opportunity for the full and fair litigation of important questions: "[T]he public interest demands that any assertion of constitutional and legal rights, quite apart from the rights of the magnitude at issue in this proceeding, be adjudicated in an orderly, principled and judicious manner." *American Medical Association* v. *Weinberger,* 522 F.2d 921, 926 (7th Cir. 1975).

II. The Constitutional Prohibitions Against Taking of Property Without Just Compensation and Without Due Process of Law Require That Plaintiffs Must Have a Realistic Opportunity to Obtain Interim Relief That Is Necessary to Preserve Their Constitutional Remedies.

The overriding practical fact of this case is that the petitioners' trade secrets are readily destructible by the government's public disclosure and use of the secret

data. This means that a preliminary injunction against such destruction is the only way to preserve petitioners' remedies under the just compensation clause and the due process clause until determination of the merits after trial.

If the existing preliminary injunction is dissolved, EPA will immediately release petitioners' secret test data to the public, and use them to support competitors' registrations, thereby destroying petitioners' basic property rights in most or all of their data. Petitioners' contentions are that these actions and the 1978 statute under which they would be taken effect an unconstitutional taking of their trade secret property rights, both because their retroactive effects violate due process limitations, and because just compensation will not be provided as a result of withdrawal of the Tucker Act remedy. But, even if petitioners were to prevail at trial on these contentions, the permanent injunction to which they would be entitled could have little meaning, since the property that was its subject would have been destroyed in the interim. Petitioners would be left without a realistic remedy for the constitutional wrongs done them.

The question, then, concerns what preliminary showing on their constitutional claims plaintiffs must make to get a preliminary injunction in these circumstances.

Petitioners submit that, under the protections of the just compensation clause and the due process clause, the standard governing the showing required for grant of a prelimimary injunction *cannot be so restrictive as to automatically or nearly automatically deny interim relief which is essential to preserve remedies against an unconstitutional taking.*

The just compensation clause of the fifth amendment is couched in clear, prohibitory language: "nor shall private property be taken for public use, without just compensation." A governmental action which takes property without paying just compensation directly contravenes the amendment, and can be enjoined. *See Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 601-02 (1935); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

The command of the due process clause is equally direct. It states that no person shall "be deprived of . . . property, without due process of law." Governmental action which takes private property without due process of law also can be enjoined. *See Louisville Joint Stock Land Bank, supra*, 295 U.S. at 601-02; *Ettor* v. *Tacoma*, 228 U.S. 148, 155-56 (1913).

Petitioners have made substantial showings below that the 1978 FIFRA amendments contravene both the just compensation and due process clauses of the fifth amendment and may be enjoined on both those grounds. Petitioners have made a substantial showing that the 1978 amendments effect a taking of property within the fifth amendment. Petitioners have also shown that this taking, because of its grossly retroactive effects, deprives them of due process of law. Petitioners further have shown that the 1978 FIFRA amendments have withdrawn the availability of the Tucker Act and have left petitioners without a remedy to provide the constitutionally required just compensation for the taking.

Both lower courts have acknowledged that petitioners' contentions by their nature raise complex and difficult issues which can be definitively decided only after a full trial on the merits. If the property in ques-

tion were durable, and could survive the interim action of the government, petitioners could simply await the results of that trial. But in fact petitioner's trade secret property is immediately destructible, and in the interim will be largely or totally destroyed by the governmental action. Even if petitioners ultimately prevail on their claims, the subject matter of the proceeding will be destroyed, and they will receive neither just compensation nor meaningful injunctive relief.

In such circumstances, the constitutional protections against taking without just compensation and deprivation of property without due process of law require that *plaintiffs must have a realistic opportunity to obtain the interim relief which is necessary to preserve their constitutional remedies.*

By contrast, the standard for preliminary injunction applied by the Second Circuit is unrealistic to the point of being virtually impossible to fulfill in cases like the present, where contentions of fifth amendment takings are involved.

The court declared that petitioners must show the "likelihood of success" on their contentions in order to get a preliminary injunction. This is a high standard. It demands more than a substantial showing of serious questions or a fair ground for litigation where equities favor the applicant. The Second Circuit applied this test in a draconian fashion by making it an indispensable condition for a preliminary injunction, regardless of how strong are the equities favoring the applicants and regardless of how grave and irreparable the harms they incur.

But, having so spoken, the court throughout its opinion manifested an assumption that "taking" claims are

by their nature often so complex that a likelihood of success simply cannot be shown on a preliminary record. Addressing petitioners' contentions of taking in violation of the fifth amendment, it said: "Those allegations raise knotty questions that are difficult to answer on the present record, especially where the answers sought must be sufficiently favorable to appellees to indicate a likelihood that they will succeed on the merits." Appendix A at 7a.[11] The court noted that "the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment," quoted an observation of the Supreme Court that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 123 (1978), and declared that "[t]he applicability of this statement to appellees' claim is apparent from the motion papers." Appendix A at 8a.

Plainly, to the court, such taking claims *generically* involve issues of such inherent difficulty that they cannot meet the court's likelihood of success standard.[12]

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[11] Although it declared that the District Court was in error in applying a "less onerous" test than that requiring likelihood of success (Appendix A at 6a), the court did not remand for amplification of the record and further proceedings under the "correct" test in the District Court. The Court of Appeals reviewed the same written record as did the district judge. See Appendix A at 9a. Thus petitioners, having shown serious questions presenting a fair ground for litigation, had no chance to try to make showings that would meet the higher standard imposed by the Court of Appeals, and that court plainly saw no point in their doing so. See Appendix A at 6a. The implication is that the court believed that its "likelihood of success" standard could not be met in a complex taking case such as the one at bar.

[12] In addition to the central taking and Tucker Act contentions, the court referred to several subordinate questions — about what

The Second Circuit is no doubt correct in this perception. Taking contentions under the fifth amendment *are* complex. In the *Penn Central* case just cited, Mr. Justice Brennan went on to say that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government," and characterized these as "*essentially ad hoc, factual inquiries.*" (Emphasis added). 438 U.S. at 124. Mr. Justice Brennan continued with reference to "factors" significant to these inquiries, including (of particular relevance here) the extent of interference with distinct investment-backed expectations, and whether or not the alleged taking is a physical invasion of property. Clearly, the close analysis and balancing of factors determinative of taking claims can be pursued only through the detailed processes of trial on the merits. The abbreviated procedures available upon application for interim relief cannot afford the court any adequate basis for deciding whether the applicant is ultimately likely to succeed on such complex issues.

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portions of petitioners' test data could be characterized as trade secret before 1978, about distinctions between the EPA's use and its disclosure of the data, and about reliance on a right of confidentiality before a specific statute existed — which, as the court stated about one and implied about the others, "complicate the problem in the instant case." Appendix A at 8a. The court did not endeavor to evaluate the merits of these issues, but it clearly suggested that their presence made it even harder to show the requisite likelihood of success. That may be, if to get a preliminary injunction plaintiffs are obliged to establish not only their central taking contentions but all other detailed and logically subsequent elements of their case. But that is what a trial on the merits is for. The question here is whether a preliminary injunction is essential to prevent deprivation of plaintiffs' property without realistic access to the remedies assured by the just compensation and due process clauses.

Thus: To get interim relief, a plaintiff *must* show likelihood of success. But a plaintiff with a taking claim, as a practical matter, often *cannot* show likelihood of success on a preliminary record. Under the Second Circuit's standard, he cannot get a preliminary injunction, and the government is free to take and destroy a plaintiff's property and his prospects for constitutionally assured relief against that action. The likelihood-of-success standard applied by the Second Circuit in the circumstances of this case therefore not only is unreasonable but is unconstitutional. Plaintiffs who are faced with an uncompensated or retroactive taking, and threatened additionally with the interim taking or destruction of their property before trial, are debarred from all realistic opportunity to preserve their property and the remedies to which they are entitled under the just compensation and due process clauses if their claims prove well-founded after trial. The Second Circuit's test substantially assures that such plaintiffs will be deprived of those constitutional rights without a remedy. It thus contravenes the just compensation and due process clauses.

Moreover, by effectively destroying petitioners' opportunity to vindicate their claims at trial, the unachievable likelihood-of-success standard renders the preliminary injunction hearing meaningless. In this additional way, it deprives petitioners of property without due process of law. *See Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit (September 24, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 921 — September Term, 1979
(Argued April 3, 1980 Decided September 24, 1980)
Docket No. 79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., *et al.*,
Plaintiffs-Appellees,

v.

DOUGLAS M. COSTLE, as Administrator of the Environmental Protection Agency and United States Environmental Protection Agency,
Defendants-Appellants.

Before:
FEINBERG, *Chief Judge*, VAN GRAAFEILAND, *Circuit Judge*, and HAIGHT, *District Judge.**

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* The Honorable Charles S. Haight, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Owen, J., preliminarily enjoining the Environmental Protection Agency from enforcing against appellees two provisions of the Federal Insecticide, Fungicide, and Rodenticide Act.

Reversed.

MICHAEL H. DOLINGER, Assistant United States Attorney (William M. Tendy, United States Attorney for the Southern District of New York, Peter C. Salerno, Assistant United States Attorney, and Edward C. Gray, Deputy Associate General Counsel, United States Environmental Protection Agency, on the brief), *for Defendants-Appellants.*

ROBERT L. ACKERLY, Washington, D.C. (Sellers, Conner & Cuneo, Washington, D.C., John D. Conner; Allan J. Berlowitz, Arthur, Dry & Kalish, New York, N.Y., on the brief), *for Plaintiffs-Appellees.*

VAN GRAAFEILAND, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York which preliminarily enjoined appellants, the Environmental Protection Agency (EPA) and its Administrator, from enforcing against appellees two provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), section 3(c)(1)(D), 7 U.S.C. §136a(c)(1)(D), and section 10, 7 U.S.C. §136h(d) (Supp. II 1978). The district judge found that appellees had raised serious questions going to the merits, had snown substantial irreparable harm and a balance of hardships tipping in their favor, and were therefore entitled to preliminary injunctive relief. We reverse.

Appellees are producers of pesticide chemicals. Since 1947, FIFRA has required them to register their pesticides with the federal government. The United States Department of Agriculture (USDA) administered the registration program from 1947 until 1970, when EPA assumed that responsibility. To assist the USDA in evaluating registration applications, the 1947 law gave it discretion to require the submission of "a full description of tests made and the results thereof upon which the claims are based". 7 U.S.C. §135b(a)(4). Acting under this provision, the USDA required each applicant to submit data showing both the efficacy of the pesticide and the hazards, if any, in its use.

These data are the subject of this litigation. Appellees test thousands of compounds for efficacy, safety, and other properties before they ultimately offer one for sale as a commercial pesticide. This costly research and lengthy development process produce data that define the peculiar characteristics of the pesticide submitted for registration. Data of this nature must be submitted to obtain registration not only in the United States but in many other countries as well. Without them, a manufacturer cannot compete effectively in the pesticide market. Appelles contend that the data submitted by them are common law trade secrets in which they have a property interest.

As enacted in 1947, FIFRA did not specifically prohibit the USDA from publicly disclosing submitted data or from using data supplied by one applicant to determine whether to register a pesticide offered subsequently by another. Although there is a dispute on this issue, it appears that the USDA made no public disclosures of data but did make use of data on hand in evaluating later applications. *See Amchem Products Inc.* v. *GAF Corp.*, 594 F.2d 470, 472 (5th Cir. 1979).

In 1972, Congress amended FIFRA to prohibit the public disclosure of information which, in the judgment of the EPA Administrator, contained or related to "trade secrets or [confidential] commercial or financial information". Pub. L. No.

92-516, §2, 86 Stat. 989 (1972). The 1972 amendments also prohibited the EPA for the first time from using data submitted by one company in support of another company's registration application, if, in EPA's judgment, such data were trade secrets or confidential commercial or financial information. Pub. L. No. 92-516, §2, 86 Stat. 979-80 (1972). The amended Act was ambiguous, however. It failed to define "trade secrets", and it did not reveal whether the new limitations on use applied to data submitted before the effective date of the 1972 amendments. The latter ambiguity was resolved in 1975 when Congress provided that the new use restrictions applied only to data submitted on or after January 1, 1970. Pub. L. No. 94-140, §2, 89 Stat. 755 (1975). Definition of "trade secret" was left to the Administrator and the courts.

The EPA took the position that the 1972 and 1975 amendments restricted use and disclosure of only a narrow range of data, such as formulas and manufacturing processes, and did not include the hazard and efficacy data at issue here. In a series of lawsuits, the industry challenged this view, meeting with some success. Several district courts held that test data might be considered a trade secret if the data met the requisites of that term as set forth in section 757, comment b, of the Restatement of Torts.[1] *See, e.g., Mobay Chemical Corp.* v. *Costle*, 447 F.Supp. 811, 824-27 (W.D. Mo. 1978), *appeal dismissed*, 439 U.S. 320 (1979); *Chevron Chemical Co.* v. *Costle*, 443 F.Supp. 1024, 1031-32 (N.D. Cal. 1978); *Dow Chemical Co.* v. *Costle*, No. 76-10087, (E.D. Mich., Nov. 16, 1977).

As originally filed on June 30, 1976, the present lawsuit also challenged EPA's construction of the 1972 and 1975

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[1] According to the Restatement, "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

amendments. While the litigation was in progress, however, Congress enacted the Federal Pesticide Act of 1978, which amended FIFRA to reflect the EPA's position. Pub. L. No. 95-396, 92 Stat. 819 (Sept. 30, 1978).[2] Appellees then amended their complaint so as to attack the new provisions on constitutional grounds. Appellees contend that the disclosure and use provisions of the 1978 amendments constitute a taking of their property without just compensation or due process of law.

In an unreported opinion dated July 5, 1979, the district court granted appellees' application for a temporary injunction prohibiting the unconsented-to disclosure and use of appellees' trade secret research and test data submitted on or before September 30, 1978, the date of the 1978 Act.[3] It is this injunction order that we now reverse.

In arguing for affirmance, appellees rely heavily on the oft-repeated doctrines that the purpose of a preliminary injunction is to preserve the status quo, *Unicon Management Corp.* v. *Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966), and avoid irreparable injury, *New York Pathological and X-Ray Laboratories, Inc.* v. *INS*, 523 F.2d 79, 81 (2d Cir. 1975), and that the grant of preliminary relief is an exercise of the trial court's discretion which will not be disturbed on appeal unless the trial judge has abused his discretion or misinterpreted the law. *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976).

[2] In substance, the amended statute permits disclosure of data concerning test results and the environmental effects of a pesticide, with limiting exceptions as to manufacturing and quality control processes, methods for testing, detecting or measuring added inert ingredients, and the identity and quantity of the added inert ingredients. 7 U.S.C. §136h (Supp. II 1978). The EPA is also authorized to use the data already in its files, with provision made in some cases for payment of appropriate compensation by the use beneficiary. *Id.* at §136a(c).

[3] The injunction order contained a limited exception applicable to formulators of the end-use pesticide products, who purchased registered pesticide chemicals from producers such as appellees.

Appellants, on the other hand, point to the reiterated rule that interim injunctive relief is an extraordinary and drastic remedy which should not be routinely granted, particularly if the grant may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond. *Medical Society of New York* v. *Toia*, 560 F.2d 535, 538 (2d Cir. 1977). Appellants also remind us of the well-established rule that where, as here, there has been no evidentiary hearing in the trial court, this Court is in as good a position as the district judge to interpret the motion papers and may therefore take a closer look at what the district judge has done. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972). Giving due deference to the arguments of both sides, we are convinced that the order appealed from cannot stand.

Before a preliminary injunction will be granted in this Circuit, it must pass one of two tests. Both require a showing of irreparable harm. One requires in addition that the moving party show a likelihood of success on the merits. The other requires that there be sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the moving party. *Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979). The district judge applied the second and less onerous of these two tests. This was error. When Congress authorizes or mandates governmental action that is in the public interest, more than a "fair ground for litigation" must be shown before the action will be stopped in its tracks by court order. *Medical Society of New York* v. *Toia*, *supra*, 560 F.2d at 538. The district court's misconception of the applicable legal standard requires reversal.

However, if the alternative "likelihood of success" test were applied, the result would be the same. Appellees' suit seeks declaratory and injunctive relief, not damages. Their claim in substance is that, insofar as FIFRA permits EPA to disclose and use their trade secret test data without just compensation or prior notice, it violates the Fifth Amendment.

Those allegations raise knotty questions that are difficult to answer on the present record, especially where the answers sought must be sufficiently favorable to appellees to indicate a likelihood that they will succeed on the merits.

In the first place, there is the question whether all or only part of appellees' test data properly could have been characterized as a trade secret prior to the 1978 amendment of FIFRA and whether this characterization should have been made in the first instance by the EPA Administrator. The 1972 amendment, the first to give appellees statutory protection against unauthorized use and disclosure, placed the responsibility for this initial determination in the Administrator's hands. *See* Pub. L. No. 92-516, §10(b), 86 Stat. 989 (1972) (current version at 7 U.S.C. §136h(b) (Supp. II 1978)); *Mobay Chemical Corp.* v. *Costle*, *supra*, 447 F. Supp. at 824-27.

To the extent that appellees' test data fall within the definition of trade secret, the parties agree that the data are property interests entitled to due process protection. *See Zotos International, Inc.* v. *Kennedy*, 460 F.Supp. 268, 272-73 (D.D.C. 1978); 14 *Williston on Contracts*, 3rd Edition, §1645 at 194.[4] However, the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment. Appellants rely on cases such as *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979) and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) to support their claim of no taking. Appellees base their opposing argument on cases such as *Kaiser Aetna* v. *United States*, 48 U.S.L.W. 4045 (Dec. 4, 1979), *Armstrong* v. *United States*, 364 U.S. 40, 46-49 (1960), *United States* v. *Causby*, 328 U.S. 256 (1946), and *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970). The Supreme Court observed in *Penn Central*, *supra*, that "what

[4] The Supreme Court discusses trade secrets in terms of "intellectual property". *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 478, 479, 482 (1974).

constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." 438 U.S. at 123. The applicability of this statement to appellees' claim is apparent from the motion papers.

To complicate the problem in the instant case, a distinction must be made between EPA's use of appellees' data and its disclosure of the data to the public. The district court erroneously treated use and disclosure alike for purposes of the temporary injunction. Finally, there is the basic issue whether appellees are entitled to rely on a vested right of confidentiality in their trade data, most of which was filed before any statutory provision for confidentiality existed. *See Westinghouse Electric Corp.* v. *United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (3d Cir. 1977).

Assuming that appellees succeed in showing an unconsented-to taking of their property, they must still establish that they are without an adequate remedy in the Court of Claims under the Tucker Act, 28 U.S.C. §1491. "Where the action against which specific relief is sought, is a taking or holding of the plaintiff's property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). The Fifth Amendment does not require that compensation precede the taking. *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

Unlike the district court, we do not read *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as rejecting the doctrines enunciated in *Larson* and *Hurley*. The question of Tucker Act remedy entered *Duke Power* only as it bore on the jurisdiction of the district court to consider the limitation of liability provisions of the Price-Anderson Act, 42 U.S.C. §2210. The issue on this appeal is not jurisdiction, but the substantive right to injunctive relief. If compensation under the Tucker Act is available, injunctive relief is not. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

FIFRA need not expressly provide for recourse to a Tucker Act remedy in order for that remedy to be available; the question is whether the Tucker Act remedy has been withdrawn. *Id.* at 126. The district court did not find that withdrawal had taken place or even that it probably had taken place. It found simply that a question of withdrawal existed. "Likelihood of success" requires more substantial underpinnings than this.

After reviewing the same written record as did the district judge, we conclude that appellees have failed to show a probability that the above questions will be answered in their favor and that they are likely to succeed on the merits. They are not entitled therefore to interim injunctive relief.[5]

The order appealed from is reversed.

[5] Appellees' claim that irreparable loss may result from the lifting of the injunction does not leave the Court unmoved. However, if appellees have a meritorious cause of action, the risk of irreparable loss might have been avoided by recourse to Fed. R. Civ. P. 65(a)(2).

APPENDIX B

Opinion of the United States District Court for the Southern District of New York (July 5, 1979)

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

AMCHEM PRODUCTS, INC., *et al.*,
Plaintiffs,

v.

DOUGLAS M. COSTLE, as Administrator of the Environmental Protection Agency, *et al.*,
Defendants.

No. 76 Civ. 2913.

July 5, 1979.

OPINION

OWEN, *District Judge.*

Plaintiffs Amchem Products, Inc., et al., are engaged, among other things, in the development and production of pesticide chemicals.

Plaintiffs request a preliminary injunction restraining the Environmental Protection Agency from disclosing research data which was submitted to government agencies in support of various pesticide applications and which plaintiffs consider to be trade secrets. It appears that EPA intends to use these data for the benefit of competitors in the issuance of pesticide registrations. Plaintiffs challenge the federal statute which purports to authorize such disclosure and use, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (hereinafter "FIFRA"), on the ground that it retroactively divests plaintiffs of their property rights, effecting a taking of property without just compensation or due process of law, in violation of the Fifth Amendment to the Constitution.

According to the plaintiffs, a chemical is valuable as a pesticide only to the extent it is both effective against the target organism and safe to non-target organisms, including human beings, and to the environment in general. Conse-

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quently, the development process has always been characterized by a substantial investment in scientific research and testing to determine the efficacy, safety and environmental effects of a potential pesticide, resulting in the production of voluminous scientific research data. The government does not dispute this. Plaintiffs contend, therefore, that in a very real sense, these data are their commercial product, and provide the key to the market. Because the development and exclusive possession of these data confer a substantial competitive advantage upon their originator, pesticide manufacturers have always considered significant portions of such data to be trade secrets, and have protected them accordingly. The government in some measure does dispute this.

The proprietary nature of trade secret property, such as research data, has long been recognized by the federal, state, and common law. In the pesticides field, federal agencies have been receiving research data from registrants since 1947 under laws and regulations which provided for confidential treatment of trade secret information, and no federal agency has ever disclosed such data. Plaintiffs invested millions of dollars to produce these research data with the legitimate expection that they were protected as trade secrets, and that their trade secret status would continue to be respected by the government.

On September 30, 1978 FIFRA was amended to authorize the disclosure of trade secrets for the use and benefit of competing manufacturers in applying for pesticide registrations. No payment is required to the data submitter for use of data submitted prior to January 1, 1970. Payment is required to be made by a competing applicant to an original data submitter for use of trade secrets submitted on or after January 1, 1970, and during a period of 15 years from the date of the registration of the pesticide for which the data was originally submitted. The terms of payment are to be arbitrated if agreement cannot be reached. As to data submitted after September 30, 1978, it is protected only for a period of ten years from the date of registration of the pesticide concerned and thereafter is without protection.

In response to the passage of the Federal Pesticide Act, plaintiffs have filed a Fourth Amended Complaint, consisting of six counts. Counts I and II challenge the constitutionality of the Federal Pesticide Act of 1978 insofar as it may retroactively divest pesticide research data submitted to EPA and its predecessor agencies between 1947 and September 30, 1978 of their formerly recognized trade secret status, and authorizes EPA to disclose these research data and use them for the economic benefit of plaintiffs' competitors in registering their pesticide chemicals.

The plaintiffs assert that competition in the pesticide industry occurs primarily through research and development. A firm's competiveness depends principally on its ability to develop new products and to develop new and better uses for existing products. Because of the enormous risk and expense involved in new product development, firms invest substantial portions of their research funds in improvement of existing products.

In order to be competitive, plaintiffs have made conscious corporate decisions to engage in these research and development activities. These efforts, which began as long ago as 1939, have involved the construction and maintenance of sophisticated research laboratories and research farms staffed by highly qualified research scientists, toxicologists, biologists, and organic chemists. Obviously, the research and development process can be lengthy, complex and exceedingly expensive.

The final products of the research and development process are the research and test data which define the properties of the pesticide and establish its safety and efficacy for commercial use. It is the possession of these data alone which enables plaintiffs to market a pesticide chemical commercially and compete in the industry.

Obviously, therefore, the data generated as a result of plaintiffs' research and development activities have immense value in the conduct of plaintiffs' business. Research data not

only are essential for pesticide registration, but are also required to meet the standards of states and foreign governments.

The experimental and analytical methodologies devised by plaintiffs during the research and development process for one pesticide chemical are especially valuable in the development of other products. Research data are valuable for developing new non-pesticidal uses for known pesticide chemicals.

Thus, the possibilities for use of pesticide research data to discover new valuable uses for pesticide chemicals are limited only by the skill and imagination of the scientists who review them.

Consequently, plaintiffs assert that pesticide research data are valuable for a wide variety of uses, and anyone possessing these data and the requisite scientific and business skills could use the data for similar purposes. If plaintiffs' competitors were to obtain access to these research data, plaintiffs would lose the substantial competitive advantage earned through research efforts; and their competitors could appropriate the value and use of these data without themselves expending the cost in labor, facilities, money and inventiveness that was required of the plaintiffs.

Because of the extensive effort and expense that go into the development of trade research data, plaintiffs have apparently taken stringent precautions in the past to insure their protection. Further, while obviously the end product is fully and publicly disclosed both as to make-up and efficacy, the agencies that have received plaintiffs' research trade secret data to consider its registration have, the plaintiffs contend, always held the research data in confidence. Indeed, it appears that after the passage of the Freedom of Information Act in 1967, the Food and Drug Administration reconfirmed that "data in support of petitions relating to pesticide chemicals" were confidential information within the "trade secrets" exemption and could not be disclosed.

Further, the Trade Secrets Act, 18 U.S.C. §1905 prohibits the unauthorized disclosure of trade secrets by agency officials and makes such disclosure punishable as a crime.

Against this background, the plaintiffs contend that the 1978 amendment to FIFRA is a retroactive taking of their property in violation of the Fifth Amendment and the appropriation of its use to the economic benefit of competing manufacturers.

In response to this, the defendants, and particularly the Administrator of EPA, which is charged with enforcing FIFRA, assert that the 1978 legislation was an authorized and reasonable exercise of Congress' police power authority under the Commerce Clause to protect the public welfare, enhance competition in the pesticide industry, and serve other important interests. Defendants also contend that plaintiffs retain the ability to make reasonably beneficial use of their property.

The government further asserts that disclosure of these data to the public is an appropriate means to lessen the likelihood that commerce in pesticides will cause harm to the public; that there is a general public interest in knowing how the government's decisions about these products are made and in holding the government accountable for the quality of its scientific assessments; that the withholding of research data inhibits the pursuit and advancement of scientific knowledge; that full disclosure plays a vital role in expanding the store of human knowledge and that a preservation of the secrecy of research data places entry barriers against the smaller firms attempting to enter the market, thereby reducing competition in what is already an oligopolistic industry, causing higher prices.

Finally, the government asserts that to the extent there has been a taking of protected property, there exists an adequate legal remedy under the Tucker Act, 28 U.S.C. §1491.

I do not deem it at all clear, given the specific provisions for payment and non-payment provided for in the 1978 FIFRA amendment 7 U.S.C. §136a(c)(1)(D) that relief under

the Tucker Act is the simple answer that the government claims. Not only does FIFRA expressly provide as to certain data there shall be no compensation at all, 7 U.S.C. §136a(c)(1)(D)(iii), thus raising the question of the withdrawal of Tucker Act jurisdiction, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), but also, and more to the point, plaintiffs here do not seek damages but rather a declaratory judgment of unconstitutionality prior to sustaining potentially uncompensable damages. This they may properly do. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Next, turning to what is clearer: (1) trade secret research data is treated as property within the intendment of Fifth Amendment protection, *American Sumatra Tobacco Corp.* v. *SEC*, 68 App.D.C. 77, 93 F.2d 236 (D.C.Cir.1937); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974); and (2) under certain circumstances the appropriation of one person's private property for use by members of the public is a taking. *Loan Association* v. *Topeka*, 20 Wall 655, 87 U.S. 655, 22 L.Ed. 455 (1874). Surely this is so even where, as here, the taking is not absolute but consists instead of a severe diminution of the value of plaintiff's property.

Finally, what is absolutely clear at this point is that under the tests of *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973), in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs who are here seeking continuing protection. The government does not dispute that if the injunction is not granted, many millions of dollars of trade research data submitted to the government over the past thirty years will in effect be destroyed in value to the submitters through disclosure to and use by their competitors. Obviously, once disclosed, trade secrets are lost forever.

For the foregoing reasons, the preliminary injunction restraining the Environmental Protection Agency from disclosing trade secret research data and from using this data for the benefit of competitors in the issuance of pesticide registrations is granted pending a trial on the merits herein. In the circumstances of this case I conclude that a bond is not required. The parties are to appear before me on August 14, 1979, at 4:30 P.M. in Courtroom 2804 to fix a date for trial on the merits.

Submit order on notice.

APPENDIX C

Preliminary Injunction Order of the United States District Court for the Southern District of New York (August 14, 1979)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*,

Plaintiffs,

v.

DOUGLAS M. COSTLE, as Administrator of the United States Environmental Protection Agency, *et al.*,

Defendants.

76 Civ. 2913
Richard Owen

PRELIMINARY INJUNCTION

August 15, 1979

Upon consideration of the plaintiffs' motion for a preliminary injunction, the memoranda and affidavits submitted by the parties, and the arguments of counsel at the hearing on the motion, and in accordance with the Court's opinion filed on July 9, 1979, it is

ORDERED that, pending a trial on the merits on plaintiffs' application for a declaratory judgment and permanent injunction, the defendants and their agents, officers and other subordinates and all other persons acting by or with them, are hereby enjoined and restrained from:

(1) Disclosing any plaintiff's claimed trade secret research or test data pertaining to pesticide chemicals, in the files of the United States Environmental Protection Agency and submitted by the plaintiff through September 30, 1978, without the permission of the data submitter.

(2) Using or considering any plaintiff's aforesaid research or test data to support any pesticide registration action

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(including registration, reregistration, amendment of a registration, or issuance of a supplemental registration) on behalf of any other applicant or registrant without the prior permission of the data submitter; provided that this paragraph shall not apply to:

(a) any registration action which plaintiffs have stated in writing will not be opposed; or

(b) the registration of a formulated (end-use) product issued to an applicant who certifies (i) that it will purchase the registered technical pesticide from a pesticide producer in order to formulate the purchased pesticide into the end-use product, and (ii) that the applicant does not own or control, and is not owned or controlled by, such producer or any other company that also owns or controls such producer.

No bond is required.

/s/ Richard Owen
RICHARD OWEN
United States District Judge

Dated: August 14, 1979

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit Denying Petition for a Rehearing (November 5, 1980)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and eighty.

Present: HON. WILFRED FEINBERG,
Chief Judge
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge
HON. CHARLES S. HAIGHT
District Judge

Docket No. 79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., CIBA-GEIGY CORP., FMC CORP., RALSTON PURINA CO., RHODIA INC., ROHM & HAAS CO., THE UPJOHN CO., UNIROYAL INC., E.I. DUPONT DE NEMOURS & CO., and VELSICOL CHEMICAL CORP.,

Plaintiffs-Appellees

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit Granting Motion for Stay of Mandate (December 2, 1980)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of December, one thousand nine hundred and eighty.

79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., CIBA-GEIGY CORP., FMC CORP., RALSTON PURINA CO., RHODIA INC., ROHM AND HAAS CO., THE UPJOHN CO., UNIROYAL INC., E.I. DUPONT DE NEMOURS & CO., AND VELSICOL CHEMICAL CORP.,

Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants

It is hereby ordered that the motion made herein by counsel for the appellee dated November 9, 1980 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) F.R.A.P. be and it hereby is granted.

HON. WILFRED FEINBERG,
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. CHARLES S. HAIGHT, D.J.
Circuit Judges

APPENDIX F

Constitutional Provisions, Statutes, and Regulations

1. United States Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Federal Pesticide Act of 1978, 92 Stat. 819, §§2 and 15, amending the Federal Insecticide, Fungicide and Rodenticide Act, §§3(c)(1)(D) and 10, 7 U.S.C. §§136a(c)(1)(D), and 136h (Supp. III, 1979)

Sec. 2. (a) Section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act is amended by —

(1) amending subsection (c)(1)(D) to read as follows:

"(D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

"(i) With respect to pesticides containing active ingredients that are initially registered under this Act after the date of enactment of the Federal Pesticide Act of 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permis-

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sion of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided*, That such permission shall not be required in the case of defensive data;

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service.

The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or aribtration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this Act, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected

person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

"(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;"

. . . .

Sec. 15. Section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act is amended by —

(1) in subsection (b), inserting immediately after "Nothwithstanding any other provision of this Act" the following: "and subject to the limitations in subsections (d) and (e) of this section"; and

(2) adding at the end thereof new subsections (d), (e), (f), and (g) as follows:

"(d) LIMITATIONS. —

"(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil, and studies on

persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: *Provided,* That the use of such data for any registration purpose shall be governed by section 3 of this Act: *Provided further,* That this paragraph does not authorize the disclosure of any information that —

"(A) discloses manufacturing or quality control processes,

"(B) discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately added inert ingredient of a pesticide, or

"(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide,

unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

"(2) Information concerning production, distribution, sale, or inventories of a pesticide that is otherwise entitled to confidential treatment under subsection (b) of this section may be publicly disclosed in connection with a public proceeding to determine whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment, if the Administrator determines that such disclosure is necessary in the public interest.

"(3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent

until thirty days after the submitter has been furnished such notice: *Provided*, That where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court shall give expedited consideration to any such action. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that —

"(A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or

"(B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in the public proceeding does not outweigh the interests in preserving the confidentiality of the information.

"(e) DISCLOSURE TO CONTRACTORS. — Information otherwise protected from disclosure to the public under subsection (b) of this section may be disclosed to contractors with the United States and employees of such contractors if, in the opinion of the Administrator, such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States for the performance of work in connection with this Act and under such conditions as the Administrator may specify. The Administrator shall require as a condition to the

disclosure of information under this subsection that the person receiving it take such security precautions respecting the information as the Administrator shall by regulation prescribe.

"(f) PENALTY FOR DISCLOSURE BY FEDERAL EMPLOYEES.—

"(1) Any officer or employee of the United States or former officer or employee of the United States who, by virtue of such employment or official position, has obtained possession of, or has access to, material the disclosure of which is prohibited by subsection (b) of this section, and who, knowing that disclosure of such material is prohibited by such subsection, willfully discloses the material in any manner to any person not entitled to receive it, shall be fined not more that $10,000 or imprisoned for not more than one year, or both. Section 1905 of title 18 of the United States Code shall not apply with respect to the publishing, divulging, disclosure, or making known of, or making available, information reported or otherwise obtained under this Act. Nothing in this Act shall preempt any civil remedy under State or Federal law for wrongful disclosure of trade secrets.

"(2) For the purposes of this section, any contractor with the United States who is furnished information as authorized by subsection (e) of this section, or any employee of any such contractor, shall be an employee of the United States.

"(g) DISCLOSURE TO FOREIGN AND MULTINATIONAL PESTICIDE PRODUCERS. — (1) The Administrator shall not knowingly disclose information submitted by an applicant or registrant under this Act to any employee or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in addition to the United States or to any other person who intends to deliver such data to such foreign or multinational business or entity unless the ap-

plicant or registrant under this Act to any employee or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in addition to the United States or to any other person who intends to deliver such data to such foreign or multinational business or entity unless the applicant or registrant has consented to such disclosure. The Administrator shall require an affirmation from any person who intends to inspect data that such person does not seek access to the data for purposes of delivering it or offering it for sale to any such business or entity or its agents or employees and will not purposefully deliver or negligently cause the data to be delivered to such business or entity or its agents or employees. Notwithstanding any other provision of this subsection, the Administrator may disclose information to any person in connection with a public proceeding under law or regulation, subject to restrictions on the availability of information contained elsewhere in this Act, which information is relevant to a determination by the Administrator with respect to whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment.

"(2) The Administrator shall maintain records of the names of persons to whom data are disclosed under this subsection and the persons or organizations they represent and shall inform the applicant or registrant of the names and affiliations of such persons.

"(3) Section 1001 of title 18 of the United States Code shall apply to any affirmation made under paragraph (1) of this subsection.".

3. Federal Insecticide, Fungicide and Rodenticide Act, §§3(c)(1)(D) and 10, as amended in 1972 by Pub. L. No. 92-516, 86 Stat. 979-80 (1972)

(c) PROCEDURE FOR REGISTRATION. —

(1) STATEMENT REQUIRED. — Each applicant for registration of a pesticide shall file with the Administrator a statement which includes —

(A) the name and address of the applicant and of any other person whose name will appear on the labeling;

(B) the name of the pesticide;

(C) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;

(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may, within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator;

. . . .

Sec. 10. PROTECTION OF TRADE SECRETS AND OTHER INFORMATION.

(a) IN GENERAL. — In submitting data required by this Act, the applicant may (1) clearly mark any portions thereof which in his opinion are trade secrets or commerical or financial information and (2) submit such marked material separately from other material required to be submitted under this Act.

(b) DISCLOSURE. — Notwithstanding any other provision of this Act, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this Act, information relating to formulas of products acquired by authorization of this Act may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

(c) DISPUTES. — If the Administrator proposes to release for inspection information which the applicant or registrant believes to be protected from disclosure under subsection (b), he shall notify the applicant or registrant, in writing, by certified mail. The Administrator shall not thereafter make available for inspection such data until thirty days after receipt of the notice by the applicant or registrant. During this period, the applicant or registrant may institute an action in an appropriate district court for a declaratory judgment as to whether such information is subject to protection under subsection (b).

4. The Trade Secrets Act, 18 U.S.C. §1905 (1976)

Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partner-

ship, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more that $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

5. Regulations of United States Department of Agriculture

7 C.F.R. §1.3(b)(1) (1949 ed.)

§1.3 *Records of limited availability.* The records enumerated below are of limited availability and information contained therein shall not be disclosed, nor shall a copy thereof be furnished, except in proper cases upon requests from Federal official sources or as specifically provided:

(a) Reports and records which by statute may be made available only in suits or administrative proceedings will be available only under the conditions provided for in the statute.

(b) Upon approval of the head of the bureau, agency or branch concerned, based upon the considerations prescribed in §1.5 the following records shall be available as indicated:

(1) Applications, reports, and like records, together with supporting data and documents, other than those under §1.2, and paragraphs (a), (b), (3) and (4) of this section, submitted by an applicant for relief, license, certificate, use, loan, grant or other benefit provided by law or by regulations authorized by law, shall be made available to the person who furnished the record, and also under compulsory process.

7 C.F.R. §1.2(a) (1954 ed.)

§1.2 *Confidential records.* The following records are confidential and shall not be subject to examination, nor shall copies thereof be furnished upon any request except in proper cases from Federal official sources:

(a) All records and reports required by statutes to be held confidential by the Department.

7 C.F.R. § 1.4(a) (1962 ed.)

§1.4 **Restriction on availability.**

The following rules shall govern the availability for examination, or the furnishing of copies, of matters of official records of the Department:

(a) *Restricted by Presidential Directive, statute, or Records Security Regulations and other regulations.* The provisions of the applicable directives, statutes, or regulations of this Department or of other agencies govern the circumstances and extent of the restriction.

7 C.F.R. §1.4(b)(15) (1962 ed.)

(b) *Administratively confidential.* The following records are administratively confidential and shall not be subject to examination except in the performance of official duties, nor shall copies thereof be furnished upon request except in proper cases from Federal official sources or as specifically provided:

. . . .

(15) Data concerning products and formulations provided by industry for research purposes or in connection with the Department's registration and other regulatory functions.

7 C.F.R. §370.13(d) (1968 ed.)

Exempt records of ARS include the following:

. . . .

(d) Matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential. This would include but would not be limited to:

(1) Scientific and technical data on products or processing methods submitted by contractor, grantee, cooperator and manufacturer or processor.

(2) Data in research studies including information on commercial facilities and procedures where disclosure would adversely affect the respondent.

(3) Records concerning research project descriptions, progress reports or information concerning incomplete research prior to formal publication when such release would adversely affect the public interest.

(4) Data on products, sales, manufacturing or processing nethods (includes data on plants, animals or animal by-products, being moved by permit or license, etc.) from manufacturers or processors, licensee, registrant, permittee and laboratory or field tests.

6. Regulations of United States Food and Drug Administration, Department of Health, Education, and Welfare

32 Fed. Reg. 9318-19 (1967), amending 10 C.F.R. § 5.74

§5.74 **Trade secrets and commercial or financial information obtained from any person and privileged or confidential.**

This exemption protects generally against disclosure of information which the person furnishing it customarily would not release to the public or which is submitted by him in reliance upon the Department's assurance that it will not be disclosed. It includes records which fall in any one of such categories as: Trade secrets; technical, commercial, or financial information which is privileged through general custom and usage in the same line of endeavor; information which is obtained from any person under explicit or implicit pledge of confidentiality; and information which is privileged under any of the following privileges: Doctor-patient, lender-borrower, attorney-client, or Government-informer privileges. It also includes data and views of scientists, scholars, or consultants submitting or making judgments on research designs in applications for grant or other support.

. . . .

APPENDIX A — EXAMPLES OR KINDS OF EXEMPT RECORDS

This appendix sets forth examples of kind of materials which are exempt from mandatory disclosure pursuant to one

or more of the exemptions in subsection (b) of the Act and Subpart F of this part.

11. Respecting Food and Drug Administration regulatory activities: Trade secrets or commercial or confidential information voluntarily revealed in requests for opinions, and opinions and related records indicating that a person, firm, or product is or is not in compliance with the law; records relating to factory inspections, sample collections, seafood inspection and other examinations and investigations by the Food and Drug Administration; Investigational New Drug files; New Drug Applications and master files, other than final printed labeling; reports and records relating to individual adverse drug reaction(s); data in support of petitions relating to pesticide chemicals, food standards, food additives, and color additives, and master files relating thereto; files relating to certification of insulin, antibiotics, and color additives, and master files relating thereto; notices of hearing issued to individuals and firms under 21 U.S.C. 335 and records relating thereto; records relating to research in support of actions to further the law enforcement or regulatory activities of the Food and Drug Administration.

No. 80-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO. INC, *et al.*,

Petitioners,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENT TO PETITION CALLING ATTENTION TO NEW MATTER PURSUANT TO RULE 22.6

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The petition for certiorari herein was filed January 2, 1981. The respondents' brief in opposition is due February 25, 1981. The present supplement is submitted pursuant to Rule 22.6.

The attention of the Court is respectfully invited to the *en banc* decision of the Court of Appeals for the Eighth Circuit in *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, No. 80-1111, filed January 7, 1981. The opinion is set forth in Appendix A.

The court there addressed the first Question Presented by this Petition for Certiorari: whether a

district court must deny a preliminary injunction, regardless of the gravity of irreparable harm or the weight of other equitable considerations, unless it finds that plaintiffs are likely to succeed on the merits. The Eighth Circuit's conclusion conflicts directly with that of the Second Circuit below.

The Eighth Circuit stated that it had "considered this case *en banc* in an effort to clarify the standard to be applied by the district courts of this circuit in considering requests for preliminary injunctive relief." Appendix A at 3a.

The court set forth a test for issuance of preliminary injunctions which requires consideration of four elements, of which the third listed is "the probability that plaintiff will succeed on the merits." Appendix A at 8a. Examining this element, the court said (Appendix A at 5a-6a):

> Some have read this element of the test to require in every case that the party seeking preliminary relief prove a greater-than-fifty-per cent likelihood that he will prevail on the merits. Under this view, even if the balance of the other three factors strongly favored the moving party, preliminary relief would be denied if the movant could not prove a mathematical probability of success at trial. Although this construction of the "probability of success" requirement is technically possible, we reject it.

The court discerningly observed that "[t]he very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test," and that "[i]n balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation." Appendix A at 6a.

These comments could have been squarely directed against the Second Circuit's disposition of the case at bar, where the court focused singly on the question of petitioners' likelihood of success. The Second Circuit did not in any way address or disturb the District Court's findings of "substantial irreparable injury" and "the balance of hardship tipping decidedly toward plaintiffs who are here seeking continuing protection," Petition for Certiorari herein, Appendix B at 16a. But the Second Circuit held that even in these circumstances the existence of "serious questions going to the merits to make them a fair ground for litigation," as found by the District Court, was not enough; in addition to a showing of irreparable harm, "the moving party [must] show a likelihood of success on the merits." Petition for Certiorari herein, Appendix A at 6a. It said that petitioners' allegations "raise knotty questions that are difficult to answer on the present record, especially where the answers sought must be sufficiently favorable to appellees to indicate a likelihood that they will succeed on the merits." *Id.*, Appendix A at 7a. "[W]e conclude that appellees have failed to show a probability that the above questions will be answered in their favor and that they are likely to succeed on the merits. They are not entitled therefore to interim injunctive relief." *Id.*, Appendix A at 9a.

By contrast, the Eighth Circuit in its January 7 *en banc* decision stated (Appendix A at 7a):

> [T]he court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. This endeavor may, of course, be necessary in some circumstances when the balance of equities may come to require a more careful evaluation of the merits. But where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if plaintiff has raised questions so serious

and difficult as to call for more deliberate investigation.

The contrast is stark. The Eighth Circuit's approach takes account of irreparable harm and other equitable considerations; the approach of the Second Circuit below disregards all of these equitable considerations unless the plaintiff has established a likelihood of success on the merits.

This comparison accentuates the conflict of the Second Circuit's test for issuance of a preliminary injunction with that of other circuits, and with standards established by this Court. See Petition for Certiorari herein at 12-18.

The confusion among district courts spoken of in the Eighth Circuit's opinions (*en banc* and concurring), though confined to that circuit, exemplifies the practical difficulty that the lack of definitive guidance on this issue can cause throughout the Federal judiciary. It seems significant that no Supreme Court decision was cited in the Eighth Circuit's opinions. The question has obvious national importance, and merits the attention of this Court.

February 13, 1981

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion *en banc* Of The United States Court Of Appeals For The Eighth Circuit (January 7, 1981)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1111

Dataphase Systems, Inc.,

Appellee,

v.

C L Systems, Inc.,

Appellant.

Submitted: October 24, 1980
Filed: January 7, 1981

Appeal from the United States District Court for the Western District of Missouri.

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, MCMILLIAN and ARNOLD, Circuit Judges, *en banc*.

HENLEY, Circuit Judge.

C L Systems, Inc. (CLSI) appeals from the district court's order of January 23, 1980, granting a preliminary injunction restraining CLSI from making "any false or misleading statement which disparages, directly or indirectly, plaintiff [Dataphase Systems, Inc.], its product, its financial condition or its ability to furnish goods and services." For reasons to be stated we vacate the preliminary injunction.

Dataphase, a Missouri corporation, and CLSI, a Massachusetts corporation, compete for contracts for the installation of computerized, automated library circulation systems. Dataphase is a relative newcomer to the field. It started business and incorporated in December, 1975. By its

own admission, CLSI is the established leader in the field of library automation.

On June 1, 1978 Dataphase filed its complaint in this suit against CLSI. Dataphase alleged that CLSI engaged in a course of conduct intended to restrain competition and deny market access to Dataphase, thereby eliminating and destroying Dataphase as a competitor. The course of anti-competitive conduct allegedly included deliberately bidding below cost in order to prevent Dataphase from receiving contracts; interfering with Dataphase's present and potential contractual obligations; making false statements to potential customers regarding Dataphase's reliability, solvency, and ability to furnish the goods and services bid upon; and, in general, falsely and maliciously disparaging Dataphase to its customers and potential customers, both orally and in writing.

The complaint alleged that this course of conduct constituted a violation of the antitrust laws, in particular section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), and section 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), and that CLSI's false and malicious accusations unlawfully interfered with Dataphase's reasonable business expectancies. Dataphase sought treble damages and equitable relief enjoining CLSI from continuing the allegedly unlawful course of conduct. Federal jurisdiction exists under 28 U.S.C.A. §§ 1331, 1332, 1337 (1976).

CLSI denied the essential allegations of the complaint and raised various defenses, *inter alia,* that all statements and representations made by CLSI to Dataphase's customers were true and not misleading. The parties proceeded with discovery, and in February and March, 1979 the district court held evidentiary hearings on Dataphase's request for a preliminary injunction. On January 23, 1980 the district court entered its order granting the preliminary injunction.

CLSI filed notice of appeal, and on March 20, 1980 this court entered an order remanding the matter "to the district court for the limited purpose of permitting that court to set

forth in detailed findings those representations and statements of the appellant that it believes 'raise questions serious enough to require litigation.' "

On April 18, 1980 the district court certified limited findings. It found that "whether there is a dangerous probability of monopolization of a specific product market in a particular geographic market" constituted a "serious litigable issue." The district court paraphrased twelve statements which it observed that Dataphase claims are completely false, while CLSI contends they are true. The district court stated that these statements "raise questions of fact which are serious enough to require litigation."

Without prejudice to the entry of a permanent injunction, we vacate the preliminary injunction and remand the case to the district court. We agree with the panel that justice would be served by proceeding to trial with all due haste in order to secure a ruling on the merits of the claims raised.

The court has considered this case *en banc* in an effort to clarify the standard to be applied by the district courts of this circuit in considering requests for preliminary injunctive relief. We apprehend that in recent years there has developed some misunderstanding of the standards to be applied by district courts of this circuit in considering requests for preliminary injunctive relief. We recognize that language in some of our recent opinions may have contributed to uncertainty as to the appropriate test or tests. Thus, we take this opportunity to reaffirm that there is a single "test" or list of considerations to be used in every case and to suggest its proper application.[1]

---

[1] Even things without life, giving a voice, whether pipe or harp, if they give not a distinction in the sounds, how shall it be known what is piped or harped? For if the trumpet give an uncertain voice, who shall prepare himself for war? So also ye, unless ye utter by the tongue speech easy to be understood, how shall it be known what is spoken? For ye will be speaking into the air.

I Corinthians 14:7-9 (American Standard Version 1929).

In *Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F. 2d 1323 (8th Cir. 1973), we enumerated four factors to be weighed by the district court in deciding whether to grant or deny preliminary relief: (1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest. *Id.* at 1326. This statement of the standard, in particular the requirements of "substantial probability" and "irreparable injury," has become known as the "traditional test." See, e.g., *Young* v. *Harris,* 599 F. 2d 870, 875-76 (8th Cir.), cert. denied *sub nom. Young* v. *Landrieau,* 444 U. S. 993 (1979); *Fennell* v. *Butler,* 570 F. 2d 263, 264 (8th Cir.), cert. denied, 437 U. S. 906 (1978).[2]

Perhaps due to dissatisfaction with restrictive practical application of the language of the traditional test, this court offered a restated version in *Fennell* v. *Butler,* 570 F. 2d 263. In that case we suggested that a preliminary injunction should issue:

> upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make

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[2] For cases applying the so-called "traditional test," see *Modern Controls, Inc.* v. *Andreakis,* 578 F. 2d 1264, 1267 n. 4 (8th Cir. 1978); *Regents of the University of Minnesota* v. *NCAA,* 560 F. 2d 352, 365 (8th Cir.), cert. dismissed, 434 U. S. 978 (1977); *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action,* 558 F. 2d 861, 866 (8th Cir. 1977); *American Train Dispatchers* v. *Burlington Northern,* 551 F. 2d 749, 751 (8th Cir. 1977); *Missouri Portland Cement Co.* v. *H. K. Porter Co.,* 535 F. 2d 388, 392 (8th Cir. 1976); *Chicago Stadium Corp.* v. *Scallen,* 530 F. 2d 204, 206 (8th Cir. 1976); *American Home Investment Co.* v. *Bedel,* 525 F. 2d 1022, 1023 (8th Cir. 1975); *Nebraska Department of Roads* v. *Tiemann,* 510 F. 2d 446, 447 (8th Cir. 1975); *Wounded Knee Legal Defense/Offense Committee* v. *FBI,* 507 F. 2d 1281, 1287 (8th Cir. 1974).

> them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief.

Id. at 264.[3]

Some confusion apparently has been spawned by our characterization of the *Fennell* standard as an "alternative test."[4] Despite this label, we find no contradiction between *Fennell* and *Minnesota Bearing*. Whatever the verbal formulation, the relevant factors remain the same. Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the plaintiff; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

The major difficulty with application of the traditional test has arisen from the phrase "probability of success on the merits." Some have read this element of the test to require in

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[3] This approach has been adopted in other circuits. See e.g., *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F. 2d 86 (9th Cir. 1975); *Gresham* v. *Chambers*, 501 F. 2d 687, 691 (2d Cir. 1974); *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F. 2d 247, 250 (2d Cir. 1973). See also *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841, 843-44 (D. C. Cir. 1977).

[4] Cases recognizing an alternative test include *Rittmiller* v. *Blex Oil, Inc.*, 624 F. 2d 857, 860-61 (8th Cir. 1980); *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F. 2d 240, 244 (8th Cir. 1979); *Bio-Medicus, Inc.* v. *Shareholders*, 608 F. 2d 1155, 1157 (8th Cir. 1979); *Minnesota Assn. of Health Care Facilities, Inc.* v. *Minnesota Department of Public Welfare*, 602 F. 2d 150, 152 (8th Cir. 1979); *Campbell "66" Express, Inc.* v. *Rundel*, 597 F. 2d 125, 127 (8th Cir. 1979); *Dakota Wholesale Liquor, Inc.* v. *Minnesota*, 584 F. 2d 847, 849 (8th Cir. 1978); *Modern Controls, Inc.* v. *Andreakis*, 578 F. 2d 1264, 1267 n. 4 (8th Cir. 1978); *Frejlach* v. *Butler*, 573 F. 2d 1026, 1027 n. 4 (8th Cir. 1978).

every case that the party seeking preliminary relief prove a greater-than-fifty-per cent likelihood that he will prevail on the merits. Under this view, even if the balance of the other three factors strongly favored the moving party, preliminary relief would be denied if the movant could not prove a mathematical probability of success at trial. Although this construction of the "probability of success" requirement is technically possible, we reject it.

The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test. At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.[5] The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case. Thus, an effort to apply the probability language to all cases with mathematical precision is misplaced.

In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the

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[5] The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. *Love* v. *Atchison, T. & S. F. Ry.*, 185 F. 321, 331-32 (8th Cir.) (Sanborn, J.), cert. denied *sub nom. West* v. *Atchison, T. & S. F. Ry.*, 220 U. S. 618 (1911). See also *Chicago, B. & Q. R. R.* v. *Chicago Great Western R. R.*, 190 F. 2d 361, 363 (8th Cir. 1951).

plaintiff has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

It follows that the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. This endeavor may, of course, be necessary in some circumstances when the balance of equities may come to require a more careful evaluation of the merits. But where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if plaintiff has raised questions so serious and difficult as to call for more deliberate investigation.

This pragmatic approach is presupposed by our caselaw. Indeed, some of this court's early decisions were couched in terms other than probability. In *Love* v. *Atchison, T. & S. F. Ry.*, 185 F. 321, 331-32 (8th Cir.) (Sanborn, J.), cert. denied *sub nom. West* v. *Atchison, T. & S. F. Ry.*, 220 U. S. 618 (1911), Judge Sanborn stated the issue as whether "questions presented in a suit for an injunction are grave and difficult. . . ." *Id.* at 331. Accord, *Chicago, B. & Q. R. R.* v. *Chicago Great Western R. R.*, 190 F. 2d 361, 363 (8th Cir. 1951). Other cases have required "a substantial controversy between the parties." *Benson Hotel Corp.* v. *Woods*, 168 F. 2d 694, 697 (8th Cir. 1948) (Gardner, J.).[6] Our goal throughout has been to achieve a clear verbal formulation yet maintaining a flexible rule.[7]

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[6] *Cf. Chicago, B. & Q. R. R.* v. *Chicago Great Western R. R.*, 190 F. 2d 361, 363-64 (8th Cir. 1951):

"[The application for preliminary injunction] raised the question whether or not there were substantial questions of law and fact for determination and whether they were of such a substantial character as to require the preservation of the status quo until those questions could be determined."

[7] *Cf.* 11 C. Wright & A. Miller, Federal Practice & Procedure § 2947, at 449-55 (1973).

In the instant case we concur with the opinion of the panel that the district court abused its discretion by issuing the preliminary injunction against CLSI.[8] We do not disagree with the findings of fact made by the district court but conclude that its findings do not support the relief granted. In particular, the district court did not find that Dataphase would suffer irreparable harm,[9] nor did it find a substantial probability that the statements made by CLSI were false or misleading and thus that Dataphase would prevail at trial.

In sum, whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the plaintiff; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that plaintiff will succeed on the merits; and (4) the public intest. The findings in the present case fail to satisfy this test.

The preliminary injunction is vacated without prejudice to the entry of injunctive relief, if during the trial of the case it appears that such relief should be given. The case is remanded to the district court for proceedings consistent with this opinion.

Ross, Circuit Judge, Concurring.

I concur in what I interpret to be this court's new test in determining whether a preliminary injunction should be

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[8] We consistently have held that the grant of preliminary relief is within the discretion of the district court. *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action,* 558 F. 2d 861, 866 (8th Cir. 1977); *Chicago Stadium Corp.* v. *Scallen,* 530 F. 2d 204, 206 (8th Cir. 1976); *Benson Hotel Corp.* v. *Woods,* 168 F. 2d 694, 697 (8th Cir. 1948).

[9] This court previously noted that under any test the movant is required to show the threat of irreparable harm. *Rittmiller* v. *Blex Oil, Inc.,* 624 F. 2d 857, at 861 (8th Cir. 1980); *Frejlach* v. *Butler,* 573 F. 2d 1026, at 1027 n. 4 (8th Cir. 1978). Thus, the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction.

granted. It is set forth in the next to the last paragraph of the opinion. I do so in the hope that after being understandably confused about what test our circuit has mandated, the district judges will now have an *en banc* determination of the proper test to follow.[1]

I do not share the opinion of the author of the majority opinion that "we find no contradiction between *Fennell* and *Minnesota Bearing,*" and I feel that most of our district judges will also read this with some misgivings. See *Fennell* v. *Butler,* 570 F.2d 263 (8th Cir.), cert. denied, 437 U.S. 906 (1978). See also *Modern Controls, Inc.* v. *Andreadakis,* 578 F.2d 1264, 1267 n. (8th Cir. 1978).

Neither do I agree that the term "probability of success" does not necessarily mean a greater than fifty percent

[1] District Judge John W. Oliver recently summarized the extent of the confusion in his opinion in *ABA Distributors, Inc.* v. *Adolph Coors Company,* No. 80-0298-CV-W-1 (W. D. Mo. Sept. 2, 1980):

"Judge Donald D. Alsop, the district judge who denied preliminary injunctive relief in *Fennell,* recently commented in *Woida* v. *United States,* 446 F. Supp. 1377, 1383 (D. Minn. 1978), that "until recently, the [Eighth Circuit] standard to be met by the party moving for a preliminary injunction was clearly defined." He added, however, that in *Fennell* "the Court of Appeals recently urged this Court to consider the adoption of alternative standards." Judge Alsop's prediction in *Woida* that "the question of the standard to be applied may not have reached its final resolution" has certainly been confirmed by the Eighth Circuit's recent opinions in *Rittmiller* and *Dataphase.*"

The confusion in the district courts, however, has taken a different form. In several recent decisions, the courts have applied both the "traditional" and the "alternative" tests. *Neil & Spencer Holdings, Ltd.* v. *Kleen-Rite, Inc.,* 479 F. Supp. 164, 168 (E. D. Mo. 1979) aff'd, 624 F. 2d 60 (8th Cir. 1980); *Walker* v. *Wegner,* 477 F. Supp. 648, 651 (S. D. 1979); *Chromalloy American Corp.* v. *Sun Chemical Corp.,* 474 F. Supp. 1341, 1346 (E. D. Mo. 1979), aff'd, 611 F. 2d 240 (8th Cir. 1979); *Woida* v. *United States,* 446 F. Supp. 1377, 1383 (D. Minn. 1978).

likelihood that the requesting party will prevail. If the courts which have used that phrase did not mean it to imply a better chance of prevailing than of not prevailing, they would have used the word "possibility" or another word of a similar meaning. I cannot agree to this illogical exercise in semantics.

The plain and simple truth is that we had a well recognized test for granting a preliminary injunction which was understood by the district courts of our circuit (the "traditional test"). A panel of our court decided a new "alternative test" should be adopted and reversed a district judge for using the traditional test. *Fennell* v. *Butler, supra,* 570 F.2d at 263. We now adopt a third test which seems to include most of the elements of both of the previously existing tests. Hopefully, since it is an *en banc* decision, it will at least give the district courts in this circuit a test that they can rely on.

No. 80-1085

FEB 25 1981

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PETITIONERS

v.

WALTER C. BARBER, JR., ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1085

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PETITIONERS

v.

WALTER C. BARBER, JR., ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals erred in reversing an order of the district court preliminarily enjoining the operation of a federal statute where plaintiffs who challenged that statute as an unconstitutional taking of their property had failed to demonstrate any likelihood of success in proving that they did not have an adequate legal remedy under the Tucker Act.

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The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 632 F. 2d 1014. The opinion of the district court (Pet. App. 11a-17a) is reported at 481 F. Supp. 195.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1980. A petition for rehearing was denied on November 5, 1980 (Pet. App. 21a-22a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1947, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), now codified at 7 U.S.C. (& Supp. III) 136 *et seq.*, has required pesticide manufacturers to register their products before those products could be sold in the United States. Before 1970, registrations were granted by the United States Department of Agriculture (USDA); and the Food and Drug Administration (FDA) was responsible for issuing tolerances to manufacturers for those pesticides that are applied to food and feed crops (Pet. App. 3a; Pet. 4n. 3).[1] Since 1970 the Environmental Protection Agency (EPA) has performed both those functions. 7 U.S.C. (& Supp. III) 136a; 21 U.S.C. 346a.

The agency's decision whether to register a particular pesticide product depends upon its evaluation of both the effectiveness of the product and the dangers presented by its use to human, animal, or plant life. See 7 U.S.C. 136(bb), 136a(c)(5)(C)-(D). Similarly, the issuance of a tolerance depends upon an evaluation of the dangers that the pesticide residue poses to consumers who will be exposed to pesticide residues in food. To carry out these regulatory responsibilities, EPA and its predecessors have required

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[1] A "tolerance" defines the level of the pesticide product and its degradation products which cannot be exceeded in food. The level at which a tolerance is set is the level required to protect the public from adverse health effects caused by pesticides. See 21 U.S.C. 346a(b).

manufacturers to submit a variety of test data in support of applications for registrations and petitions for tolerances (Pet. App. 3a). These data define the risks and benefits of the products for which registration is sought and generally include test data reflecting the effectiveness of the pesticides in performing their pest suppression function ("efficacy data") and test results concerning the dangers of the product ("hazard data").[2] The question whether EPA may disclose such data to the public or may use it in assessing the applications of persons other than the data-submitters has been the subject of extensive debate during the past decade, and Congress has produced several differing solutions. Petitioners' suit challenges the latest amendment, which permits public disclosure of certain categories of data and which, with certain limitations, permits EPA to consider the data in assessing any applications to which it is relevant.

As originally enacted in 1947 (ch. 125, 61 Stat. 163), FIFRA did not prohibit USDA from considering relevant data supplied to it by one applicant to determine whether to register the products of other companies. Because many of the pesticides for which registrations were sought were the same or substantially the same as previously registered products supported by data submitted to USDA (see S.

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[2]Hazard data consist of the following major types of studies: 1) acute toxicity studies, which define how poisonous the pesticide is when ingested, inhaled, or applied to the skin or eyes; 2) chronic toxicity studies, which are used to determine if chronic exposure to the pesticide will have any long-term health effects such as causing cancer or birth defects; 3) residue studies, which define the level of the pesticide and its degradation products which remain in the food; 4) environmental chemistry studies, which are used to determine how much of the pesticide and its degradation products remain in the environment after application; and 5) fish and wildlife studies, which define how toxic the pesticide is to fish and wildlife which may be exposed to the pesticide after application in the environment.

Rep. No. 95-334, 95th Cong., 1st Sess. 7 (1977)), USDA frequently did not require the later applicant in effect to duplicate the tests which USDA already had in its files. See *Amchem Products, Inc.* v. *GAF Corp.*, 391 F. Supp. 124, 127-128 & n.7 (N.D. Ga. 1975), remanded on other grounds, 529 F. 2d 1297 (5th Cir. 1976).

The 1947 law also contained no prohibition against disclosure of hazard and efficacy data, but it did specifically prohibit disclosure of product formulas (7 U.S.C. (1970 ed.) 135a(c)(4) and 135f(c)). As a matter of agency practice, USDA did not make public any of the data submitted to it (Pet. App. 3a). Similarly, although 21 U.S.C. 346a did not prohibit the disclosure of data submitted in support of petitions for tolerances, FDA as a matter of agency practice did not make those data public.

In 1972, FIFRA was substantially revised by the Federal Environmental Pesticide Control Act (Pub. L. No. 92-516, 86 Stat. 973) ("1972 Amendments")). One of the most significant changes was the addition of a new Section 10 (7 U.S.C. (1970 ed., Supp. II) 136h) governing disclosure of data submitted in support of applications for registration.[3] That Section allowed applicants to identify for EPA which portions of their data they regarded as "trade secrets or commercial or financial information" (Section 10(a)) and it prohibited the EPA Administrator from publicly disclosing any "information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential" (Section 10(b)). The 1972 Amendments did not, however, define the term "trade secrets."

In response to complaints from some sectors of the pesticide industry, Congress also added a new Section 3(c)(1)(D), 7 U.S.C. (1970 ed., Supp. II) 136a(c)(1)(D)),

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[3]Section 10 as enacted in 1972 is set forth at Pet. App. 33a-34a.

which, for the first time, limited EPA's freedom to consider data submitted by one company in evaluating another company's application for registration.[4] Under Section 3(c)(1)(D), EPA was prohibited from making such use of "trade secret" information without the permission of the data submitter. While it could consider all other types of information without the permission of the data submitter, it could do so in a given case only if the applicant "offered to pay reasonable compensation [to the data submitter] for producing the test data to be relied upon." (*Ibid.*)

The 1972 Amendments left unclear whether the Section 3(c)(1)(D) limitations on consideration of data applied to all data in EPA's files prior to the effective date of the 1972 Amendments. To resolve this ambiguity, Congress amended Section 3(c)(1)(D) in 1975 to provide specifically that the limitations imposed by that section were applicable *only* to data submitted on or after January 1, 1970. FIFRA of 1975, Pub. L. No. 94-140, 89 Stat. 751, 755 ("1975 Amendments").[5]

The extent of the Section 10 disclosure limitation and the Section 3(c)(1)(D) data-consideration limitation remained unclear in other respects, however, because of Congress's

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[4]Section 3(c)(1)(D) as enacted in 1972 is set forth at Pet. App. 33a. The section was added at the request of industry representatives, notably the National Agricultural Chemicals Association, a pesticide industry trade association. See, *e.g.*, *Federal Pesticide Control Act of 1971: Hearings on H.R. 26, H.R. 1077, H.R. 1722, etc. Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 331 (1971).

[5]Mobay Chemical Corporation challenged the 1975 Amendments on constitutional grounds, arguing that Section 3(c)(1)(D) caused an unconstitutional taking of its property rights in the data it had submitted prior to January 1, 1970. This claim was rejected by a three-judge court, which held that Section 3(c)(1)(D) did not "take" any of Mobay's property rights. *Mobay Chemical Corp.* v. *Costle*, 12 Envir. Rep. Cases 1572 (W.D. Mo. 1978). Mobay's direct appeal to this Court under 28 U.S.C. 1253 was dismissed on the ground that the three-judge court had been improperly convened. 439 U.S. 320 (1979). No appeal was taken to the Eighth Circuit.

failure to define the term "trade secret." EPA took the view that in the 1972 and 1975 Amendments, Congress had intended to give trade secret protection to only a narrow range of data—principally statements of formulas and manufacturing processes. EPA thus concluded that most hazard and efficacy data could be disclosed to the public and could be considered by EPA in evaluating registration applications without the permission of the data-submitter. Data-submitting firms successfully challenged this interpretation in the courts, obtaining decisions holding that the 1972 Congress had intended the "trade secret" prohibition to apply to any data, including hazard and efficacy data, that met the criteria specified in Section 757 of the *Restatement of Torts* (1939). *E.g., Chevron Chemical Co.* v. *Costle,* 443 F. Supp. 1024 (N.D. Cal. 1978); *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). As a result of these decisions, the "trade secret" prohibition in Section 10 operated to bar public access to much of the data on which EPA based its decisions to register pesticides; and the corresponding prohibition in Section 3(c)(1)(D) allowed data-submitters to prevent any other firm from obtaining registrations for products that were the same or substantially the same as previously registered products unless the second firm duplicated the data supporting the first registration or it was determined, after perhaps years of litigation, that particular items of data were not trade secrets. In part because of such "trade secret" controversies and the complexities of determining compensation for data use, "the process of registering new pesticides simply ground to a halt." *Chevron Chemical Co.* v. *Costle*, No. 80-2037 (3d Cir. Feb. 4, 1981), slip op. 14 (footnote omitted).[6]

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[6]In *Chevron Chemical*, the Third Circuit held that Section 3(c)(1)(D), as amended in 1978, does not constitute a taking of property within the meaning of the Fifth Amendment.

In 1978, Congress again amended FIFRA, enacting the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 ("1978 Amendments"). It substantially changed Section 3(c)(1)(D) and Section 10 in order to cure the problems caused by the courts' interpretation of the term "trade secret." A new provision, Section 10(d) (7 U.S.C. (Supp. III) 136h(d)), was added, making hazard and efficacy data available for public disclosure.[7] Because of their significance for public health and safety, and because Congress believed it desirable to inform the public of the bases for agency decisions, EPA is now expressly authorized to disclose hazard and efficacy data even if such data may be "trade secrets" under the *Restatement of Torts* definition. See, *e.g.*, H.R. Rep. No. 95-663, 95th Cong., 1st Sess. 18 (1977).

Congress also abolished the 1972 Section 3(c)(1)(D) prohibition on agency use of "trade secret" data, recognizing that a regulatory scheme under which only registered pesticides of proven safety and effectiveness could be marketed gave an unfair competitive advantage to certain large manufacturers, who were protected from competition even after any patent had expired: small potential competitors

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[7]Under Section 10(d)(1), 7 U.S.C. (Supp. III) 136h(d)(1), EPA may disclose "[a]ll information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil, and studies on persistence, translocation, and fate in the environment, and metabolism." That same section, however, prohibits EPA from disclosing information that would reveal "manufacturing or quality control processes" or certain details pertaining to "deliberately added" inert ingredients; but these limitations do not apply if "the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment."

were discouraged from entering the market by the necessity of duplicating safety and efficacy tests for products already established as safe and effective by data that were contained in agency files but were rendered inaccessible by statute. See, *e.g.*, S. Rep. No. 95-334, 95th Cong., 1st Sess. 8, 30-31 (1977); see also 124 Cong. Rec. S15303-S15304 (daily ed. Sept. 18, 1978) (remarks of Sen. Leahy). In place of the flat prohibition on agency use of "trade secret" data, Congress amended Section 3(c)(1)(D) to establish a comprehensive scheme governing EPA's consideration of test data submitted by pesticide registrants in issuing registrations to subsequent applicants for registration of the same or substantially similar pesticides. It provides for certain protected periods during which the data generally may not be used in this manner by EPA without the written permission of the original data submitter (Section 3(c)(1)(D)(i)) and other periods during which data may be considered without such permission, provided that the applicant makes an offer to compensate the data submitter (Section 3(c)(1)(D)(ii)). (If the parties cannot agree on compensation, the amount is fixed by an arbitrator (*ibid.*).) After expiration of such periods, test data may be considered without restriction (Section 3(c)(1)(D)(iii)).

2. This suit was filed in 1976 to challenge EPA's interpretation of FIFRA. Following enactment of the 1978 Amendments, petitioners amended their complaint to allege that the amended Act violated the Constitution. Their principal allegation was that, with respect to data submitted before passage of the 1978 Amendments, Sections 3(c)(1)(D) and 10 of FIFRA constituted a retroactive taking of their "trade secret properties" without just compensation, in violation of the Fifth Amendment (Pet. App. 11a, 13a).

In opposition to petitioners' motion for a preliminary injunction, EPA contended that, even assuming arguendo that those provisions constituted a taking of petitioners'

property, injunctive relief was inappropriate because petitioners had an adequate remedy at law under the Tucker Act, 28 U.S.C. 1491. Rejecting this argument, the district court agreed to restrain EPA from "disclosing trade secret research data and from using this data for the benefit of competitors in the issuance of pesticide registrations * * * pending a trial on the merits" (Pet. App. 17a), and it entered an order to this effect, applicable to data submitted before September 30, 1978 (*id.* at 19a-20a). The district court based its decision on its conclusions that the availability of the Tucker Act was "not * * * at all clear" (*id.* at 15a-16a), that the amended statutory provisions for agency consideration and disclosure of certain pre-1978 test data had produced "a severe diminution of the value of [petitioners'] property" (*id.* at 16a), and that petitioners had, therefore, presented "serious questions going to the merits to make them a fair ground for litigation, with the balance of hardship tipping decidedly toward [petitioners]" (*ibid.*). The court also noted, concerning the Tucker Act question, that petitioners were not seeking damages but were asking for "a declaratory judgment of unconstitutionality prior to sustaining potentially uncompensable damages" and that petitioners could properly seek such relief (*ibid.*).

3. EPA appealed the grant of the preliminary injunction and the court of appeals reversed (Pet. App. 1a-9a). It held that the district court had erred in failing to require petitioners to show both a likelihood of success on the merits and a threat of irreparable harm (*id.* at 6a). The court of appeals explained that "[w]hen Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order" (*ibid.*). Although the court found (*id.* at 7a) that petitioners' taking allegations "raise knotty questions that are difficult to answer on the present record," it concluded

(*id.* at 8a) that petitioners had failed to make a sufficient showing that they are without an adequate remedy in the Court of Claims under the Tucker Act so as to justify injunctive relief. Citing this Court's decision in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the court of appeals observed (Pet. App. 8a-9a) that "[i]f compensation under the Tucker Act is available, injunctive relief is not" and that the test for Tucker Act coverage is whether the Act was withdrawn by Congress in its enactment of FIFRA. As the court of appeals noted (*id.* at 9a), the district court had found only that a question concerning such withdrawal existed, not that Congress actually—or even probably—had withdrawn the Tucker Act remedy as to any uses of trade secret data found by a court to constitute a taking of property within the meaning of the Fifth Amendment.

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioners' contentions, does not conflict with decisions of this Court or of other courts of appeals. It accordingly presents no issue meriting review by this Court.

1. The court of appeals held (Pet. App. 6a) that in cases in which plaintiffs seek to enjoin the operation of a statute, entitlement to a preliminary injunction requires a showing of irreparable harm and likelihood of success on the merits. It was error, the court stated (*ibid.*), to apply the "less onerous" test, appropriate in other types of cases, according to which preliminary relief is available on a showing of "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the moving party." In making this distinction, the court of appeals was saying nothing more than that, in cases in which an injunction will necessarily delay effectuation of the public interest as expressed by Congress in a statute, a stronger showing must be made

with respect to possible success on the merits than is the case where no such threat to the public interest is posed. As demonstrated below (pages 12-15), the relevant authorities, including cases cited by petitioners, support that proposition.

But even assuming that the court of appeals was wrong in holding that petitioners were required to show a likelihood of success on the merits of their claims, the judgment of the court was still proper, because a major weakness of petitioners' showing on the merits—*i.e.*, their inability, in the estimation of both courts below, to make a substantial showing that relief under the Tucker Act would be unavailable to them for any constitutional injuries they might ultimately prove—also seriously impaired their showing of a threat of irreparable harm. Petitioners have cited no case in which the operation of a statute was enjoined in such circumstances, and for this reason, as the court of appeals noted (Pet. App. 6a), petitioners' claims would fail regardless of which of the two tests is applied.

2. We treat the Tucker Act point first, because we believe it reveals the narrowness of the ruling in this case and, hence, the inappropriateness of this case as a vehicle for enunciating general principles concerning the proper test for the grant of a preliminary injunction.

The district court manifestly did not question the applicability of the Tucker Act to the kinds of constitutional claims raised by petitioners, and it acknowledged that, as this Court has held in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974), the proper question is not whether Congress has affirmatively made the Tucker Act applicable with respect to constitutional injuries inflicted by the operation of a given statute, but whether Congress has withdrawn the Tucker Act remedy. The district court did not find it probable that Congress had withdrawn the Tucker Act remedy, but merely held (1) that there was a

"question" whether Congress might have withdrawn the remedy when it amended FIFRA in 1978 and (2) that, in any event, petitioners sought injunctive relief rather than damages.

In fact, the district court's basis for concluding that Congress might have withdrawn the Tucker Act remedy—the existence of limited payment provisions in the 1978 Amendments (see Pet. App. 6a)—does not logically support such a conclusion. Indeed, the compensation provisions demonstrate that Congress believed that the interests in question—at least as to consideration of data for the benefit of competitors—were reducible to monetary equivalents; they would therefore be amenable to treatment under a damage remedy such as the Tucker Act. That Congress did not provide in the 1978 Amendments for compensation by the United States shows not that Congress rejected the application of the Tucker Act but rather that it assumed—and we believe correctly so—that the amendments were not invalid absent "just compensation," *i.e.*, that they did not constitute a taking of property within the meaning of the Fifth Amendment. Although the Tucker Act question is a purely legal issue and was fully briefed below, petitioners adduced no legislative history to strengthen the unpersuasive reasoning of the district court.

If, as both courts below assumed, the Tucker Act applies to the types of constitutional claims asserted by petitoners and there is only a negligible showing of withdrawal of that remedy, then petitioners cannot be said to have made a strong showing either that they would succeed on the merits of their claims or that they faced a serious threat of irreparable harm. This case is therefore clearly distinguishable from decisions of this Court on which petitioners principally rely (Pet. 12-14). In *Brown* v. *Chote*, 411 U.S. 452 (1973), the Court noted that the applicant for preliminary injunctive relief—an individual who challenged the imposi-

tion of a filing fee as a prerequisite to having his name placed on the primary ballot for a state office—would have been "foreclosed, absent some relief," from any opportunity to be a candidate in the election in question. 411 U.S. at 457. Similarly, in *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929), this Court found that if the injunction were denied, the "injury to the moving party [would] be *certain* and irreparable." 279 U.S. at 815 (emphasis supplied).[8]

The fact that petitioners chose to pursue injunctive relief rather than damages adds nothing to their case. If the Tucker Act is available, then their claim that the statute is invalid as an uncompensated taking of their property must fail. *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 133-134; see also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 703 n.27 (1949).

3. The cases on which petitioners rely (Pet. 14-18; Supp. Pet. 1-4) to support their contention that the decision below conflicts with decisions of other circuits are either cases in which no statute was enjoined[9] or cases in which

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[8] *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), offers petitioners even less support. The Court there reversed the grant of an injunction, and petitioners' reliance (Pet. 13) is on dictum in the plurality opinion indicating (412 U.S. at 822 n.15) that "[i]n some cases" the possibility of irreparable damage might be "great enough" to justify issuance of an injunction even in the absence of a showing of likelihood of success on the merits. The cases cited as examples of this (*ibid.*) are cases from the Second Circuit involving only the rights of private parties and not involving an order enjoining the operation of a statute.

[9] *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, No. 80-1111 (8th Cir. Jan. 7, 1981) (en banc); *Roth* v. *Bank of the Commonwealth*, 583 F. 2d 527 (6th Cir. 1978), cert. dismissed, 442 U.S. 925 (1979); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977); *Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*,

injunctive relief was denied.[10] The former obviously do not conflict with the decison below since the court of appeals did not purport to announce any rule applicable to such cases. The latter at best supply isolated dicta in support of petitioners' arguments.

Indeed, some of the cases on which petitioners rely affirmatively support the court of appeals' decision in this case. The general rule is that the decision whether to grant the extraordinary remedy of a preliminary injunction turns on a "flexible interplay of the four factors to be considered." *Telvest, Inc.* v. *Bradshaw*, 618 F. 2d 1029, 1032 (4th Cir. 1980). Accord, *Roth* v. *Bank of the Commonwealth*, 583 F. 2d 527 (6th Cir. 1978), cert. dismissed, 442 U.S. 925 (1979). These four factors are:

> (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
>
> (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> (3) the probability that plaintiff will succeed on the merits; and
>
> (4) the public interest.

C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2948, at 430-431 (1973). The strength of the showing required in a particular case as to any given factor depends on the showing made with respect to the other factors. In

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550 F. 2d 189 (4th Cir. 1977); *Aguirre* v. *Chula Vista Sanitary Service*, 542 F. 2d 779 (9th Cir. 1976); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F. 2d 86 (9th Cir. 1975).

[10]In *Telvest, Inc.* v. *Bradshaw*, 618 F. 2d 1029 (4th Cir. 1980), the Fourth Circuit reversed the grant of a preliminary injunction, and in *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F. 2d 811 (3d Cir. 1978), the Third Circuit affirmed the denial of a preliminary injunction.

particular, where a legislature has enacted a statute it deems essential to the effectuation of the public interest, and the injunction sought would interfere with the operation of that statute—with no assurance of any protection for the public interests the statute was designed to serve—a stronger showing may be required with respect to the other three factors than would otherwise be the case. As this Court observed in *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944) (citations and footnote omitted):

> [W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. This is but another application of the principle * * * that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Thus, in *Ohio Oil Co.* v. *Conway, supra*, in which this Court upheld a preliminary injunction temporarily relieving the plaintiff of the necessity of paying a state severance tax that would become unrecoverable once paid, the Court assured itself that the State would be adequately indemnified by an injunction bond to assure payment of the tax, with interest and penalties, in the event the constitutionality of the tax statute were upheld against plaintiff's challenge. 279 U.S. at 815. No such bond can assure that the anticompetitive effects and other injuries to the public interest which Congress foresaw as occurring in the absence of the 1978 Amendments to FIFRA would not occur while the injunction sought by petitioners is in effect.

Hence, in a case such as this, in which an injunction would interfere with the public interest as determined by Congress—a circumstance relevant to both the public interest factor and the infliction of harm on the defendant—the court of appeals properly required a reasonably strong showing of the possibility of success on the merits. As the Third Circuit noted in *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F. 2d 811 (1978), a case on which petitioners rely (Pet. 17-18):

> "[I]n a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate "even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required." In contrast, where the threatened irreparable injury is limited or is balanced to a substantial degree by countervailing injuries which would result to third parties, or to the public interest from the issuance of an injunction, "greater significance must be placed upon the likelihood that the party will ultimately succeed on the merits of the litigation."

573 F. 2d at 815 (footnotes omitted). See also *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, No. 80-1111 (8th Cir. Jan. 7, 1981) (Supp. Pet. App. 6a-7a) (lesser showing of possible success on the merits sufficient where the balance of *all* the other factors tips strongly in plaintiff's favor). Because the district court failed to take specific account of the public interest, the court of appeals, consistent with settled principles governing the issuance of preliminary injunctions, reversed the grant of the injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO. INC., *et al., Petitioners,*

v.

WALTER C. BARBER, JR., ACTING ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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ARGUMENT

I. Respondents Misstate The Question Presented To This Court

The matter before this Court is the proper standard for the issuance of preliminary injunctions. The issue is whether those who seek preliminary injunctions must demonstrate that they will probably succeed on the merits, as held by the Second Circuit below, or whether a movant's chances of success on the merits should count as a single factor to be weighed together with the irreparability of harm and with other considerations, as established in decisions of other circuits and of this Court.

This subject is important to the administration of the federal judiciary, and needs authoritative clarification by this Court.

In stating the Question Presented, however, respondents attempt to bypass this question by focusing upon a single collateral subissue, concerning the Tucker Act. They frame the question in terms of whether the preliminary injunction was properly reversed where, as to that Tucker Act issue, petitioners "had failed to demonstrate *any* likelihood of success" (Brief in Opposition, 1, emphasis added).

This formulation diverts the Court from the significant issues tendered by the decision below and trivializes them. These issues do not concern the Tucker Act, but concern the standard for issuance of preliminary injunctive relief, especially the matter of how the requisite quantum of prospective success on the merits should be determined in given circumstances.

Moreover, respondents' formulation of the Question Presented is highly inaccurate and misleading. Neither court below found that petitioners had failed to demonstrate any possiblity of success on the Tucker Act issue, or, for that matter, on any of petitioners' other contentions, which

respondents have chosen entirely to ignore. The district court found that "in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs" (Petition for Certiorari, Appendix, 16a); from context, the Tucker Act question is plainly among the "serious questions going to the merits". The court of appeals held only that the district court should have required petitioners to demonstrate a mathematical probability of success on the merits, and it did not find this high degree of success shown upon the preliminary injunction record. *See* Petition for Certiorari, Appendix, 9a.

Thus, it is unfair to suggest that either court below found plaintiffs to have made a showing on the Tucker Act issue, or on any other issue, which was any less strong than a showing that just missed meeting the Second Circuit's stringent standard.[1]

It is noteworthy that respondents assail petitioners' showings of prospective success on the merits only as to the single issue concerning the Tucker Act. Petitioners had advanced substantial showings on the merits of the entire case, including their principal contentions concerning the threatened taking and disclosure of their previously-submitted trade secret data, retroactively and without just compensation, in violation of fifth amendment protections and of statutory assurances that the data would be held in confidence. Respondents do not mention petitioners' showings on these issues.[2]

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[1] Respondents' misleading formulation of the Question Presented is paralleled by an assertion in the body of their argument that "*as both courts below assumed*, the Tucker Act applies to the types of constitutional claims asserted by petitioners and there is *only a negligible showing* of withdrawal of that remedy" (Brief in Opposition, 11, emphasis added). Again, for the same reasons, the statement is groundless and unfairly stated.

[2] Petitioners made substantial showings on the Tucker Act issue. The language and history of the FIFRA data compensation provision make it clear that this complex system was intended by

II. Respondents' Brief Ignores Entirely The Important Constitutional Issues Raised By The Second Question Presented In The Petition For Certiorari

In their second Question Presented, petitioners urge that the Second Circuit's test for grant of preliminary injunctions, as applied in cases like the present, is unconstitutional. Without interim injunctive protection, the trade secret research data will be disclosed to the public, thus destroying before trial the subject matter of petitioners' constitutional claims. The Second Circuit's test — which demands a showing of "likelihood of success" that is practically impossible to fulfill in complex taking cases — contravenes the just compensation and due process clauses, by denying claimants a reasonable opportunity to get the interim

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Congress to be the exclusive remedy of data owners for the government's use and disclosure of their data. Prior to 1978, FIFRA gave data owners access to the federal courts to obtain "just compensation" from the user under section 3(c)(1)(D) if EPA's compensation award was deficient. 118 Cong. Rec. 33922 (1972). But in the 1978 FIFRA amendments, Congress withdrew all federal court jurisdiction and remedies, limiting data owners to a nonappealable arbitration procedure. The amended statute provides that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination" except for fraud, misrepresentation and the like. FIFRA §3(c)(1)(D)(ii), 7 U.S.C. §136a(c)(1)(D)(ii) (Supp. III 1979). In the 1972 FIFRA, compensation was available for all data submitted by petitioners. Congress subsequently cut off all compensation for data submitted before 1970. *See* FIFRA §3(c)(1)(D)(ii). The withdrawal of previously existing compensation rights for pre-1970 data, and the withdrawal of access to all federal courts to obtain any shortfall from "just compensation," show Congress' intent to make the FIFRA compensation scheme the sole available remedy for data owners, and to preclude any further compensation remedy through the Tucker Act. Even if available, the multiplicity of Tucker Act suits that a data owner would be required to pursue to obtain just compensation each time the EPA disclosed or used tens of thousands of items of trade secret data would be unfairly onerous, raise insuperable problems of valuation, and would be intrinsically inadequate to compensate for the unjust enrichment of petitioners' competitors as a result of the disclosure of the trade secrets.

injunctive relief that is necessary to preserve their remedies under those clauses. *See* Petition for Certiorari, 21-27.

The respondents' brief in opposition entirely ignores this significant aspect of the case.

III. Respondents' Brief Itself Shows That The Second Circuit's Test For Preliminary Injunctive Relief Is Not Reconcilable With The General Rule Of The Circuits

The district court found serious questions on the merits, but the Second Circuit held that the plaintiffs' showing on those questions did not rise to the level of demonstrating that they probably would succeed. Solely for this reason, the court of appeals reversed the preliminary injunction. Under the Second Circuit's uncompromising standard, the gravity and irreparability of harm to plaintiffs and the weight of other equitable considerations are totally disregarded, unless plaintiffs show greater-than-even chances that they will succeed on the merits.

This approach contrasts sharply with the role that appraisal of the chances of success is given by other circuits and by this Court. There, the chance of success is one of several factors to be weighed and balanced (Petition for Certiorari, 12-21; Supplement to Petition Calling Attention to New Matter, 1-4 and Appendix).

Remarkably, the respondents nowhere directly assert that the Second Circuit applied the general rule or any other stated standard which they claim to be proper. The most they claim is that relevant authorities "support" a proposition which respondents inaccurately say explains the intent of the court of appeals (Brief in Opposition, 9-10), and that the court's reversal of the district court was "consistent with settled principles governing issuance of preliminary injunctions" (Brief in Opposition, 15).

Indeed, a major portion of the respondents' argument is that "even assuming that the court of appeals was wrong in holding that petitioners were required to show a likelihood of

success on the merits of their claims, the judgment of the court was still proper" (Brief in Opposition, 10), because the court reached a justifiable result. (The propriety of asking this Court to consider the post hoc justifiability of the result is discussed at pages 8-9 below.)

Respondents, for practical purposes, implicitly acknowledge that the Second Circuit applied an erroneous standard.

They recognize that the "general rule" (to which they cite no exceptions) "is that the decision whether to grant the extraordinary remedy of a preliminary injunction turns on a 'flexible interplay of the four factors to be considered.' * * * The strength of the showing required in a particular case as to any given factor depends on the showing made with respect to the other factors" (Brief in Opposition, 13). Under this approach, "the probabilty that plaintiffs will succeed on the merits" (Brief in Opposition, 13) is neutral in a quantitative sense. That is, it measures the plaintiff's chances of success as a *relative* matter; it does not impose an *absolute* requirement to show better-than-even chances of success. The quantum of prospective success that must be shown in any case will vary with the balance of the other equitable factors, and may be less than a preponderance. *See* Petition for Certiorari, 12-18; Supplement to Petition Calling Attention to New Matter, 2.

The Second Circuit did not apply the general rule, and its holding can derive no support from it. The Second Circuit established an inflexible, mechanistic test, requiring petitioners "to show both a likelihood of success on the merits and a threat of irreparable harm" (Brief in Opposition, 8). It ruled out any finely graded balancing of equitable considerations, or "flexible interplay of the four factors to be considered." It would not permit any flexibility in its rigid likelihood-of-success test so as to make it "depend on the showing made with respect to the other factors." The test is as mechanical as a slot machine: no likelihood of sucess, no interim relief.

It is thus disingenuous to claim that the authorities, which express the flexible general rule, "support the court of appeals' decision in this case" (Brief in Opposition, 13).

Respondents attempt to justify the action of the Second Circuit as being "consistent with" the relevant authorities on the ground that the injunction allegedly would "delay effectuation of the public interest as expressed by Congress in a statute" (Brief in Opposition, 9). In these circumstances, they argue, "a stronger showing must be made with respect to possible success on the merits than is the case where no such threat to the public interest is posed" (Brief in Opposition, 9-10), and "the court of appeals properly required a reasonably strong showing of the possibility of success on the merits" (Brief in Opposition, 15).

It should be carefully noted that respondents do not go so far as to state that the "stronger showing" must or may be a mathematical probability of success, as demanded by the Second Circuit's test.[3] They seem to suggest, however, that the mere presence of a statute which is sought to be enjoined justifies the requirement that plaintiffs show a probability of succeeding on the merits, irrespective of the degree of harm to the plaintiffs, the actual injury which the specific injunction might cause to the public interest or to the defendants, or any other relevant considerations which should be weighed and balanced.

Perhaps, where a statute would be enjoined, a "stronger" or "reasonably strong" showing should be required, *if found warranted by the circumstances of the*

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[3] Thus it is fallacious to state that the court of appeals was saying "nothing more than that" a "stronger showing" is called for where a statute would be enjoined (Brief in Opposition, 9-10). The court *did* say more: it employed an absolute standard requiring a preponderant probability of success, rather than some relatively-determined "stronger" or "reasonably strong" showing of the possibility of success. *Nowhere do the respondents claim that the Second Circuit's standard is correct.*

given case. But the determination of what standard of success is demanded in the particular case should be made through the weighing and balancing process, taking into account all of the relevant circumstances *of that case.*[4] Respondents themselves so state: "The strength of the showing required *in a particular case* as to any given factor depends on *the showing made* with respect to the other factors" (Brief in Opposition, 13, emphasis added).

That was not the approach taken by the court below. It did not examine either the specific statute or specific public interest values implicated in this case, to see whether, weighed together with the other factors, they required a relatively strong showing of prospective success on the merits. The court made no effort to examine the specific circumstances of this case at all. Its inquiry went no further than to observe that a statute was being enjoined.

Without inspecting the circumstances of the particular case, a court cannot assume that enjoining a statute will necessarily injure the public interest, let alone do so to a degree that sweeps to the side all otherwise relevant equitable considerations bearing upon grant of an injunction. This is well illustrated in the present case, where the injunction restrains only a small fraction of the range of operation of the 1978 amendments in question, and does not in fact thwart Congress' public interest objectives. Congress intended the 1978 FIFRA amendments to improve the competitive position

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[4] In *Yakus* v. *United States*, 321 U.S. 414 (1944), relied on by respondents, *the statute itself* dictated the nonavailability of preliminary injunctive relief, as needed in the public interest to protect an emergency program. In its discussion of equity practice regarding interlocutory injunctions, the Court stressed judicial discretion and consideration of the circumstances of the particular case. 321 U.S. at 437-42. It held that "we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would, in the special circumstances of this case, involve a denial of constitutional rights." *Id.* at 439. Congress "has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest." *Id.* at 441.

of small pecticide producers known as formulators by removing, for them, entry barriers posed by costly research requirements.[5] The preliminary injunction, drafted with EPA's concurrence as to form, perpetuated Congress' exemption of formulators, permitting these businesses to continue to obtain pesticide registrations and compete regardless of the injunction against EPA's use of data. (*See* Preliminary Injunction, ¶ (2)(b), Appendix C to Petition for Certiorari). These more than 4,000 formulators constitute 98-99% of all pesticide registrants. Congress also intended to make pesiticide data available for review in the public interest, but not by competitors, particularly "foreign and multinational pesticide producers." *See* FIFRA §10(d) and (g), 7 U.S.C. §136h(d) and (g) (Supp. III 1979). Before the preliminary injunction was granted, petitioners represented to the district court that, notwithstanding an injunction, they would make pesticide data available for review to public interest scientists and representatives, and they have in fact done so. The preliminary injunction therefore only prevents access to trade secret information by competitors, but does not in fact impair the intended public interest.

IV. The Respondents' Claim, That The Second Circuit's Result Can Be Justified On Grounds Other Than The Propriety Of Its Holding, Is Inappropriate And Unsuccessful

Respondents advance a further remarkable argument: "But even assuming that the court of appeals was wrong in holding that the petitioners were required to show a likelihood of success on the merits of their claims, the judgment of the court was still proper" (Brief in Opposition, 10). The judgment was "proper", respondents argue, because

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[5] Report of House Committee on Agriculture, H.R. Rep. No. 95-633, 95th Cong., 1st Sess. 18-19 (1977). Formulators are persons "who buy registered basic pest control chemicals from another producer to formulate his purchased pesticide into an end-use product . . . ." *Id.* at 19.

of petitioners' "inability, in the estimation of both courts below, to make a substantial showing that relief under the Tucker Act would be unavailable to them for any constitutional injuries they might ultimately prove" (*ibid.*). In other words, the result can be justified, after the fact, on the basis of this single subordinate issue.

Petitioners have been at some pains above (pages 1-2) to show how inaccurate and misleading it is to suggest (as by the words "in the estimation of both courts below" in the passage just quoted) that plaintiffs had made no showing or only a negligible showing on the merits of the Tucker Act issue. In fact, a substantial showing was made. In any event, withdrawal of the Tucker Act, which is only one of several complex subjects implicated in the merits of this case, can be addressed only after resolution of the primary issue of the proper standards for issuance of preliminary injunctions.

Respondents would have this Court pass upon the rights and wrongs of the district court's basis for concluding that Congress might have withdrawn the Tucker Act remedy (Brief in Opposition, 11). They are inviting the Court to consider in detail (although without benefit of the record) the degree of prospective success that petitioners showed or might have shown with respect to a single issue. That point is but one subordinate element in the cluster of substantive issues evaluated by the district court in its consideration of the several factors bearing upon whether a preliminary injunction should be granted. It would be especially inappropriate for this Court to be placed in the position of a district court to examine an issue (the prospective merits of a Tucker Act defense) different from the issue presented by the decision under review (the proper standard for grant of preliminary injunctive relief).

Though this Court has from time to time passed upon the appropriateness of preliminary injunctive relief,[6] it has

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[6] *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929); *Brown* v. *Chote*, 411 U.S. 452 (1973). *See also Yakus* v. *United States*, 321 U.S. 414, 439-42 (1944).

not addressed the subject in an extensive or comprehensive manner. The question of the showing that must be made for preliminary relief is one that holds great consequence for the day-to-day exercise by the federal courts of one of their most formidable and delicate powers. The legal issues and practical affairs at stake in preliminary injunction proceedings are characteristically substantial, complex and numerous. Sound judicial administration calls for decisional standards that assure supple and finely focused consideration of all pertinent factors. In contrast to the Second Circuit's per se rule, which disregards all other considerations if it is not fulfilled, a flexible and refined jurisprudence is at hand in the four-factor approach cited by the government and advocated by petitioners. In view of this striking conflict of the circuits, the present case supplies a fitting occasion for the Court to consider whether such an approach should be announced for guidance of the entire federal judiciary.

Respectfully submitted,

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